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# United States Ratification of the Human Rights Covenants

David Weissbrodt\*

## I. INTRODUCTION

On October 5, 1977, President Carter signed the International Covenant on Economic, Social and Cultural Rights,<sup>1</sup> and the International Covenant on Civil and Political Rights.<sup>2</sup> On that day, the President promised to promptly transmit the two treaties to the Senate for ratification. In so doing, he drew a parallel between the "lofty standard of liberty and equality" embodied in the American Declaration of Independence and the principles of international human rights reflected in the United Nations Charter.<sup>3</sup> He then described the importance of the Covenants:

The covenants that I signed today are unusual in the world of international politics and diplomacy. They say absolutely nothing about powerful governments or military alliances or the privileges and immunities of statesmen and high officials. Instead, they are concerned about the rights of individual human beings and the duties of governments to the people they are created to serve—the rights of human beings and the duties of government.

. . . .

It would be idle to pretend that these two covenants themselves reflect the world as it is. But to those who believe that instruments of this kind are futile, I would suggest that there are powerful lessons to be learned in the history of my own country.

Our Declaration of Independence and the Bill of Rights expressed a lofty standard of liberty and equality. But in practice, these rights were enjoyed only by a very small segment of our people.

In the years and decades that followed, those who struggled for universal suffrage, those who struggled for the abolition of slavery, those who struggled for women's rights, those who struggled for racial equality, in spite of discouragement and personal danger, drew their own inspiration from these two great documents—the Declara-

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1. International Covenant on Economic, Social and Cultural Rights, *entered into force* Jan. 3, 1976, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) [hereinafter cited as Covenant on Economic, Social and Cultural Rights].

2. International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, 52, U.N. Doc. A/6316 (1967) [hereinafter cited as Covenant on Civil and Political Rights].

3. Remarks on Signing International Covenants on Human Rights, 13 WEEKLY COMP. OF PRES. DOC. 1488, 1488-89 (Oct. 5, 1977).

tion of Independence, the Bill of Rights and our own Constitution. Because the beliefs expressed in these documents were at the heart of what we Americans most valued about ourselves, they created a momentum toward the realization of the hopes that they offered.

My hope and my belief is that the international covenants that I sign today can play a similar role in the advancement and the ultimate realization of human rights in the world at large.<sup>4</sup>

Four months later, on February 23, 1978, President Carter submitted the two Human Rights Covenants, along with two other treaties pertaining to human rights,<sup>5</sup> to the Senate for its advice and consent. In a letter accompanying the four treaties,<sup>6</sup> the President recommended a series of reservations and understandings as to the Covenants.<sup>7</sup> These proposed limitations substantially undermine the lofty expectations created by the President's earlier pledge to work for prompt ratification.

This Article begins by briefly discussing the background of the Covenants and the reasons why United States citizens should be interested in their ratification.<sup>8</sup> Turning next to the reservations and understandings proposed in President Carter's letter of February 23, the Article describes the content of the letter<sup>9</sup> and identifies three standards against which these reservations can be evaluated—the United States Constitution,<sup>10</sup> international law,<sup>11</sup> and the response of other nations.<sup>12</sup> Using these standards, the Article next criticizes the President's proposals, asserting that the reservations and under-

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4. *Id.* It is interesting to note the similarity between President Carter's views and those expressed by John Foster Dulles when Dulles was a member of the United States Delegation to the United Nations General Assembly. See Simsarian, *United Nations Action on Human Rights in 1948*, 20 DEF'T STATE BULL. 18, 19 (1949).

5. International Convention on the Elimination of All Forms of Racial Discrimination, entered into force Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter cited as Convention on Racial Discrimination]; American Convention on Human Rights, entered into force July 18, 1978, O.A.S. Doc. OEA/SER. K/XVI/1.1 Doc. 65 (1970), reprinted in [1969] Y.B. ON HUMAN RIGHTS 390 (United Nations), 65 AM. J. INT'L L. 679 (1971), and 9 INT'L LEGAL MATERIALS 101 (1970).

6. President's Human Rights Treaty Message to the Senate, 14 WEEKLY COMP. OF PRES. DOC. 395 (Feb. 23, 1978), reprinted in *Four Treaties Pertaining to Human Rights: Message from the President of the United States*, 95th Cong., 2d Sess. at III (1978) [hereinafter cited as *Message*].

7. The proposed reservations to each of the four treaties are quite similar. This Article, however, will be limited to the two Human Rights Covenants, because they establish the most authoritative international consensus as to the meaning of human rights. See sources cited in note 14 *infra*.

8. See text accompanying notes 14-82 *infra*.

9. See text accompanying notes 83-108 *infra*.

10. See text accompanying notes 109-14 *infra*.

11. See text accompanying notes 115-24 *infra*.

12. See text accompanying notes 125-38 *infra*.

standings in the letter overreach requirements imposed by the Constitution, violate principles of international law, and are more protective of present domestic practice than the reservations attached by any other nation.<sup>13</sup>

## II. WHY SHOULD UNITED STATES CITIZENS BE INTERESTED IN THE COVENANTS?

Taken together, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (popularly known as the Human Rights Covenants) constitute the world's most authoritative answer to the question: "What are human rights?"<sup>14</sup> The Covenant on Civil and Political Rights establishes an international minimum standard of conduct for all participating governments, *ensuring* the rights of self-determination;<sup>15</sup> legal redress;<sup>16</sup> equality;<sup>17</sup> life;<sup>18</sup> liberty;<sup>19</sup> freedom of movement;<sup>20</sup> fair, public, and speedy trial of criminal charges;<sup>21</sup> privacy;<sup>22</sup> freedom of expression,<sup>23</sup> thought, conscience, and religion;<sup>24</sup> peaceful assembly;<sup>25</sup> freedom of association (including trade union rights);<sup>26</sup> family;<sup>27</sup> and participation in public affairs;<sup>28</sup> but *forbidding* torture; "cruel, inhuman or degrading treatment or punishment;"<sup>29</sup>

13. See text accompanying notes 139-225 *infra*.

14. See Jenks, *The United Nations Covenants on Human Rights Come to Life*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL, EN HOMMAGE À PAUL GUGGENHEIM 805, 806-07 (1968). See also COALITION FOR A NEW FOREIGN AND MILITARY POLICY, *THE HUMAN RIGHTS COVENANTS: ONE BODY OF RIGHTS* 4 (1978); M. MOSKOWITZ, *INTERNATIONAL CONCERN WITH HUMAN RIGHTS* 111 (1976); Newman, *Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus*, PUB. L. 274, 276 (1967); Schwelb, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511, 518 (1976). See generally Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 134-35 (1977).

15. Covenant on Civil and Political Rights, *supra* note 2, art. 1.

16. *Id.* art. 2; *id.* art. 26 (equal protection of law).

17. *Id.* art. 2, para. 1; *id.* art. 3.

18. *Id.* art. 6.

19. *Id.* art. 9.

20. *Id.* art. 12.

21. *Id.* art. 14.

22. *Id.* art. 17.

23. *Id.* art. 19.

24. *Id.* art. 18.

25. *Id.* art. 21.

26. *Id.* art. 22.

27. *Id.* arts. 23, 24.

28. *Id.* art. 25.

29. *Id.* art. 7.

slavery;<sup>30</sup> arbitrary arrest;<sup>31</sup> double jeopardy;<sup>32</sup> and imprisonment for debt.<sup>33</sup>

By ratifying the Covenant on Economic, Social and Cultural Rights, a government agrees to take steps for the progressive realization of the following rights to the full extent of its available resources:<sup>34</sup> the right to gain a living by work;<sup>35</sup> to have safe and healthy working conditions;<sup>36</sup> to enjoy trade union rights;<sup>37</sup> to receive social security;<sup>38</sup> to have protection for the family;<sup>39</sup> to possess adequate housing and clothing;<sup>40</sup> to be free from hunger;<sup>41</sup> to receive health care;<sup>42</sup> to obtain free public education;<sup>43</sup> and to participate in cultural life, creative activity, and scientific research.<sup>44</sup>

The United Nations began drafting these international agreements immediately after the General Assembly adopted the Universal Declaration of Human Rights<sup>45</sup> on December 10, 1948. Eighteen

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30. *Id.* art. 8.

31. *Id.* art. 9.

32. *Id.* art. 14, para. 7.

33. *Id.* art. 11.

34. Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 2.

35. *Id.* art. 6.

36. *Id.* art. 7.

37. *Id.* art. 8, para. 1(b).

38. *Id.* art. 9.

39. *Id.* art. 10, para. 2.

40. *Id.* art. 11.

41. *Id.*

42. *Id.* art. 12.

43. *Id.* arts. 13-14.

44. *Id.* art. 15.

45. G.A. Res. 217A, U.N. Doc. 810, at 56 (1948). For a description of the process of drafting the Covenants, see Sohn, *A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, *THE UNITED NATIONS AND HUMAN RIGHTS* 38, 101-69 (Eighteenth Report, 1968).

Despite participation in the initial formulation of these major U.N. human rights instruments, the United States found itself unable to ratify these same instruments, largely as a result of congressional opposition during the early 1950's. Several members of Congress, most notably Ohio Senator John W. Bricker, became fearful that the Convention on the Prevention and Punishment of the Crime of Genocide, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277 (1951), and the various U.N. treaty drafts (which later became the basis for the Human Rights Covenants and the Convention on Racial Discrimination, *supra* note 5) might encourage international scrutiny of racial discrimination, and might infringe on prerogatives of the states in the United States federal system. See 98 CONG. REC. 907-14 (1952) (remarks of Sen. Bricker); Bricker & Webb, *The Bricker Amendment—Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529 (1954). See also *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 10-11 (1953) [hereinafter cited as *Joint Resolution Hearings*] (Bricker's attack on the International Covenants).

As a result of these concerns, a series of proposals, known popularly as the Bricker Amendment, was introduced to amend the United States Constitution so as to restrict

the government from entering into international agreements that might infringe on the powers of the states or be applicable domestically in courts without implementing legislation. The various versions of the Bricker Amendment are reproduced in 12 REG. N.Y. CTRY B.A. 320, 343-46 (1957).

An amended version of the Bricker Amendment failed by a single vote to pass the Senate in 1954. 100 CONG. REC. 2251 (1954). To secure the defeat of the Amendment, Secretary of State Dulles was forced to make a commitment that the United States did "not intend to become a party to any such covenant [on human rights] or present it as a treaty for consideration by the Senate." See *Joint Resolution Hearings, supra* at 825; U.S. DEP'T OF STATE, PUB. NO. 6318, [1953] U.S. PARTICIPATION IN THE U.N. 155-56 (Report by the President to the Congress) (compiled in INT'L ORG. & CONF. SER. III, 115 (1954-57)). Dulles also indicated that the United States would not sign the Convention on the Political Rights of Women, *entered into force* July 7, 1954, 193 U.N.T.S. 135 (instrument of ratification signed by the President March 22, 1976), nor would the Eisenhower Administration seek ratification of the Genocide Convention. U.S. PARTICIPATION IN THE U.N., *supra* at 156; see Schmidhauser & Berg, *The American Bar Association and the Human Rights Conventions*, 38 SOC. RESEARCH 362, 401 (1971). See generally V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 129-41 (1970); Buergenthal, *International Human Rights: U.S. Policy and Priorities*, 14 VA. J. INT'L L. 611, 613 (1974); Gardner, *A Costly Anachronism*, 53 A.B.A.J. 907, 910 (1967); Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305, 1325-26 (1952).

The Kennedy Administration attempted to relax the 1953 "Dulles Doctrine," submitting three minor human rights conventions to the Senate for approval. However, only one of these instruments, the Supplementary Convention on Slavery, was eventually acceded to by the United States. *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 265-66 (1973) (statement of Prof. Egon Schwelb, Yale Law School). See generally *Human Rights Conventions: Hearings Before a Subcomm. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Human Rights Conventions Hearings*]; Del Russo, *International Law of Human Rights: A Pragmatic Approach*, 9 WM. & MARY L. REV. 749, 764-66 (1968); MacChesney, *Editorial Comment, Should the United States Ratify the Covenants? A Question of Merits, Not of Constitutional Law*, 62 AM. J. INT'L L. 912, 915-17 (1968). The Human Rights Covenants and the Racial Discrimination Convention were not even submitted to the Senate for consideration.

The enactment of domestic civil rights legislation, the announcement of court decisions to eradicate some of the worst injustices of racial discrimination, the related decrease in concern for states' rights, and the increasing interest in international human rights, have considerably improved the climate for ratification of these multi-lateral treaties. In 1974, the report of Rep. Donald Fraser's Subcommittee on International Organizations and Movements listed 29 human rights conventions which the United States had not ratified, and recommended the ratification of those pending before the Senate at that time. SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP 21, 24 (1974).

By 1976, further inroads into the Dulles Doctrine had been made. In January 1976, the Senate ratified the Inter-American Convention on Granting of Political Rights to Women, and the U.N. Convention on the Political Rights of Women, 122 CONG. REC. S356-57 (daily ed. Jan. 22, 1976). The Genocide Convention may be nearing Senate ratification now that the American Bar Association has reversed its long-standing opposition to the treaty. *Genocide Convention, Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 48 (1977). See generally Comment, *The United States and the 1948 Genocide Convention*, 16 HARV. INT'L L.J. 683 (1975).

years later, on December 16, 1966, the General Assembly unanimously adopted the two Human Rights Covenants,<sup>46</sup> along with an Optional Protocol to the Civil and Political Covenant.<sup>47</sup> This Optional Protocol enables individual citizens of ratifying nations to lodge complaints of human rights violations with a Human Rights Committee established by the Civil and Political Covenant.<sup>48</sup>

By early 1976, the requisite 35 nations had ratified the two treaties and the necessary ten countries had ratified the Optional Protocol, so that they became legally binding on participating nations.<sup>49</sup> As of September 15, 1978, 54 nations had ratified the International Covenant on Economic, Social and Cultural Rights; 18 more, including the United States, had signed but not ratified that treaty.<sup>50</sup> Similarly, 52 governments had ratified the Civil and Political Covenant, while 18 others, including this country, had merely signed the Covenant.<sup>51</sup> The Optional Protocol had been ratified by twenty nations and signed by nine more.<sup>52</sup> The United States, however, has not yet even signed the Protocol.<sup>53</sup>

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46. The Covenants were adopted unanimously by the General Assembly, with no states abstaining and only Portugal and South Africa absent at the time of the vote. Sohn, *supra* note 45, at 168-69.

47. Optional Protocol to the International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, G.A. Res. 2200A, 21 GAOR Supp. (No. 16) 49, 59, U.N. Doc. A/6316 (1966) [hereinafter cited as Optional Protocol].

48. Covenant on Civil and Political Rights, *supra* note 2, arts. 28-34; See Parson, *The Individual Right of Petition: A Study of Methods Used by International Organizations to Utilize the Individual as a Source of Information on the Violations of Human Rights*, 13 WAYNE L. REV. 678, 697-98 (1967). See also note 67 *infra*.

49. Covenant on Civil and Political Rights, *supra* note 2, art. 49; Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 27; Optional Protocol, *supra* note 47, art. 9; see Schwelb, *supra* note 14, at 512.

50. See Human Rights International Instruments: Signatures, Ratifications, Accessions, etc., 12 (1978), U.N. Doc. ST/HR/4 [hereinafter cited as Human Rights Ratifications] (extracted and compiled from Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977, U.N. Doc. ST/LEG/SER.D/11). The material in this publication has been updated through September 15, 1978, by reference to unpublished, untitled, and unnumbered working documents of the Office of Legal Affairs of the United Nations. These documents will eventually be issued by the United Nations as an inclusion in the next version of the cited publication.

Of the 54 ratifying nations, thirteen were in Latin America and the Caribbean, eleven in Eastern Europe, twelve in Western Europe, Canada, and Australia, nine in Africa, six in the Middle East, and three in Asia. *Id.* at 2-11.

51. *Id.* at 12. Of the 52 ratifying nations, thirteen were in Latin America and the Caribbean, ten in Eastern Europe, twelve in Western Europe, Canada, and Australia, nine in Africa, six in the Middle East, and two in Asia. *Id.* at 2-11.

52. *Id.* at 12. Of the twenty ratifying nations, ten were in Latin America and the Caribbean, six in Western Europe, and four in Africa. *Id.* at 2-11.

53. *Message*, *supra* note 6, at XV, mentions the Optional Protocol, *supra* note 47, but does not indicate the intention of the Carter Administration as to its signature

Because the Covenants represent an international consensus on what constitutes basic human rights, any appeal by the United States government to another government for an end to racial oppression,<sup>54</sup> for the release of political prisoners,<sup>55</sup> for the cessation of torture<sup>56</sup> and political killings,<sup>57</sup> or for fair democratic elections,<sup>58</sup> can be

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or ratification. More recently, the Administration has formulated a position which was issued in response to inquiries initiated by the author:

The President did not sign the Optional Protocol to the Covenant on Civil and Political Rights because it was considered advisable to proceed first with the basic commitments with respect to the rights set forth in each of the Covenants, together with their non-optional implementation provisions. The question of extending the area of implementation of the Covenant on Civil and Political Rights can be addressed at a later stage.

The implementation body under the Covenant on Civil and Political Rights, the Human Rights Committee, came into being only recently. The Committee's special competence to deal with communications from States Parties or from individuals rests upon the optional provisions of Article 41 of the Covenant on Civil and Political Rights and on the Optional Protocol. Observation of the manner in which this Committee carries out its important duties, especially in dealing with state or individual complaints, will be helpful in determining at some future time whether the U.S. Government should accept the competence of the Committee in these two areas.

The United Kingdom and the U.S.S.R. have both signed and ratified the two Covenants. France has neither signed nor ratified either of the Covenants. None of the three countries has signed or ratified the Optional Protocol.

Letter from Hodding Carter III, Assistant Secretary of State for Public Affairs (July 12, 1978) (on file with the author).

54. See, e.g., *United States Policy Toward Southern Africa: Hearing Before the Subcomm. on Africa of the House Comm. on International Relations*, 95th Cong., 1st Sess. 3 (1977).

55. See, e.g., *HUMAN RIGHTS & AMERICAN DIPLOMACY: 1975-77*, at 35-37, 77 (J. Buncher, ed. 1977); Weissbrodt, *Human Rights Legislation and United States Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231, 278-79 (1977) [hereinafter cited as *Human Rights Legislation*]; Address by Assistant Secretary of State Patricia M. Derian to Lawyer's Committee for Civil Rights under Law and Div. V of D.C. B. Ass'n (March 16, 1978).

56. See, e.g., *Human Rights in Uruguay and Paraguay: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 110-13 (1976) (statement of Hewson A. Ryan, Dep't of State); *Torture and Oppression in Brazil: Hearing Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 1 (1974) (remarks of Rep. Donald Fraser); J. Buncher, *supra* note 55, at 77 (1977); Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269, 290 & n.104 (1978); *Human Rights Legislation*, *supra* note 55, at 279.

57. See, e.g., *Human Rights in Cambodia: Hearing Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 2 (1977) (statement of Richard C. Holbrooke, Dep't of State).

58. See, e.g., *The Recent Presidential Election in El Salvador: Implications for U.S. Foreign Policy: Hearings Before the Subcomms. on International Organizations and on Inter-American Affairs of the House Comm. on International Relations*, 95th Cong., 1st Sess. 5 (1977) (statement of Charles W. Bray III, Dep't of State); *Human*



strengthened by reference to the principles embodied in the Covenants. In addition to addressing those human rights that have figured prominently in the news during recent years—the rights to be free from arbitrary arrest, torture, cruel, inhuman or degrading treatment, and arbitrary deprivation of life—the Covenants also provide a potentially important source of protection for other rights that have received less public attention but are of no less concern to people everywhere.<sup>59</sup>

Torture and political imprisonment do not occur in a vacuum; frequently they happen in a context where related human rights are being violated. For example, workers denied the right to join a trade union or a farm family denied the right to earn a livelihood may seek political redress and become political prisoners as a consequence. If Americans are serious about helping political prisoners and alleviating their plight,<sup>60</sup> they must also be sensitive to the interrelationship of civil, political, economic, social, and cultural rights. In this regard, the Covenants provide a basis for protecting the entire constellation of human rights.

The United States, however, cannot credibly appeal to other nations to cease violations of the two Covenants unless it first willingly subjects its own human rights record to international scrutiny. Hence, given the significance of the Covenants and the Optional Protocol in defining and protecting international human rights, it is important that the United States join the growing number of countries that have ratified these treaties.<sup>61</sup> The United States, moreover,

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*Rights in North Korea: Hearing Before the Subcomm. on International Organizations of the House Comm. on International Relations, 94th Cong., 2d Sess. 2-3 (1976) (statement of Oscar V. Armstrong, Dep't of State); Human Rights Legislation, supra note 55, at 234. See also Address by Deputy Secretary of State Warren Christopher to American Bar Association (Feb. 13, 1978); Nordheimer, Dominican Soldiers Halt the Counting in Presidential Vote, N.Y. Times, May 18, 1978, at 1, col. 6; What Counts in Santo Domingo, N.Y. Times, May 19, 1978, § A, at 26, cols. 1-3.*

59. See President's Remarks to People of Other Nations on Assuming Office, 13 WEEKLY COMP. OF PRES. DOC. 89 (Jan. 20, 1977). See generally SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HOUSE COMM. ON INTERNATIONAL RELATIONS, 95th Cong. 2d Sess., HUMAN RIGHTS CONDITIONS IN SELECTED COUNTRIES AND THE U.S. RESPONSE 6-15 (1978); see also *Human Rights Legislation, supra* note 55, at 254-55; A. Blyberg, Proposals for the Implementation of the Right to Food 3-4 (1977) (unpublished draft); Civic Participation Division, Agency for International Development, Human Rights and Economic Development 17 (Dec. 15, 1976) (unpublished report); J. Silverstone, The Covenants 4 (Oct. 7, 1977) (unpublished Agency for International Development memorandum).

60. See sources cited in note 55 *supra*.

61. *Human Rights Conventions Hearings, supra* note 45, at 99-100 (testimony of Richard Gardner); MacChesney, *International Protection of Human Rights in the United Nations*, 47 NW. U.L. REV. 198, 216 (1952); Newman, *Ombudsmen and Human Rights: The New U.N. Treaty Proposals*, 34 U. CHI. L. REV. 951, 962 (1967); see M.

has relatively little to fear from ratification<sup>62</sup> since its human rights record, although not unblemished, is relatively good.<sup>63</sup> Where the United States does have problems—for example, in its treatment of Native Americans<sup>64</sup>—it should welcome international encouragement to improve the situation, as a way of demonstrating this nation's impartial concern for human rights everywhere.<sup>65</sup>

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GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 221-22 (1962); Dillard, *Should the Constitution be Amended to Limit the Treaty Making Power?*, 26 S. CAL. L. REV. 347, 373, 384-88 (1953); Shestack & Cohen, *International Human Rights: A Role for the United States*, 14 VA. J. INT'L L. 673, 681, 689 (1974).

62. Indeed, the United States is already obligated by the United Nations Charter to respect human rights. U.N. CHARTER arts. 55-56; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 57 (South Africa obligated under U.N. Charter to respect human rights); see Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 339-48 (1972). The Covenants constitute an authoritative interpretation of the Human Rights Clauses of the Charter. See Sohn, *supra* note 45, at 169; Tuttle, *Are the "Human Rights" Conventions Really Objectionable?*, 3 INT'L LAW. 385, 394 (1969).

63. See A. White, *Ratification of the International Covenant on Civil and Political Rights and Potential United States Domestic Legal Problems* 17 (1977) (unpublished memorandum). See also Moskowitz, *The Covenants on Human Rights: Basic Issues of Substance*, 53 PROC. AM. SOC'Y INT'L L. 230, 230-31 (1959).

By signing the Covenants, the United States accepts the responsibility to refrain from acts calculated to frustrate the objects of the treaty. Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in United Nations Conference on the Law of Treaties* 291, U.N. Doc. A/CONF. 39/11/Add. 2 [hereinafter cited as Vienna Convention] (1971) ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or . . . expressed its consent to be bound by the treaty . . .").

The Helsinki agreement also referred specifically to the Human Rights Covenants: The United States and the other parties to the Helsinki Agreement stated that they will "fulfill their obligations as set forth in the international declarations and agreements in this field, including, *inter alia*, the International Covenants on Human Rights, by which they may be bound." Conference on Security and Cooperation in Europe, Final Act, Helsinki 1975, art. I(a)(VII), *reprinted in Conference on Security and Cooperation in Europe, Part II: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong. 2d Sess. 119, 124 (1976). See generally HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD (T. Buergenthal ed. 1977). Accordingly, one might contend that the United States is already bound by the principles enumerated in the Covenants. Ratification, however, would further clarify the United States' legal obligation to obey the Covenants.

64. See O'Brien, U.S. Policy toward Native Americans and International Human Rights 9, 39-41 (Oct. 6-7, 1977) (unpublished memorandum prepared for the Hendricks Symposium, University of Nebraska). See generally D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970); see also M. GALEY, NORTH AMERICAN CONFERENCE ON THE PROTECTION OF HUMAN RIGHTS FOR INDIANS AND INUITS 16-20 (1973); Wolford & Rumpf, *U.N. Covenants: Why We Need Ratification*, CLERGY & LAITY CONCERNED (CALC) REP. November-December 1977, at 3.

65. For example, the ratification of the Covenants might lead to some rethinking of decisions like *Ingraham v. Wright*, 430 U.S. 651 (1977), which construed the eighth

The Covenants not only establish an international minimum standard of human rights conduct, but also institutionalize that standard and create international procedures for the implementation of those rights.<sup>66</sup> The Covenants require that the participating governments report on their implementation of the rights set forth in those two instruments, thus subjecting themselves to international scrutiny and questioning.<sup>67</sup> Furthermore, the Optional Protocol to the Civil

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amendment's prohibition against "cruel and unusual punishment" to apply only to the criminal penal process. *Id.* at 664-71. Article 7 of the Covenant on Civil and Political Rights would appear to have a broader application, forbidding "torture . . . cruel, inhuman or degrading treatment or punishment." *But see* Bitker, *Application of the United Nations, Universal Declaration of Human Rights Within the United States*, 21 DE PAUL L. REV. 337, 342-43 (1971). "Although the wording in the Declaration of Human Rights may sound more inclusive, the phrasing in the Constitution has been interpreted quite broadly by the Supreme Court." *Id.* at 342. *See also* Stoiber, *The Right to Liberty: A Comparison of the European Convention on Human Rights with the United States Practice*, 5 HUMAN RIGHTS 333, 350 (1976).

66. *See* M. GANJI, *supra* note 61, at 178-92; Capotorti, *The International Measures of Implementation Included in the Covenants on Human Rights*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 131, 134-38 (A. Eide & A. Schou eds. 1967) (reporting system); *id.* at 138-43 (settlement of interstate disputes); *id.* at 143-46 (individual petitions under the Optional Protocol). *But see* MacChesney, *supra* note 45, at 913-14.

67. Article 16 of the Covenant on Economic, Social and Cultural Rights, *supra* note 1, and Article 40 of the Covenant on Civil and Political Rights, *supra* note 2, establish procedures for states parties to report upon the measures they have taken to achieve the rights guaranteed by the two treaties. *See* Procedures for the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/RES/1988(LX) (May 14, 1976); Schwelb, *Civil and Political Rights: The International Measures of Implementation*, 62 AM. J. INT'L L. 827, 838-44 (1968). In addition, Article 21 of the Covenant on Economic, Social and Cultural Rights and Article 40, paragraph (4), of the Covenant on Civil and Political Rights provide for general comments and recommendations based on the country reports.

At first glance, this reporting procedure might appear relatively innocuous, in that governments might be expected to produce only self-laudatory reports. In studying the quite similar reporting procedures under Article 9 of the Convention on Racial Discrimination, *supra* note 5, however, Professor Buergenthal has found that the scrutiny and cross-examination given these reports can make the reporting procedure a very effective tool of human rights implementation. Buergenthal, *Implementing the U.N. Racial Convention*, 12 TEX. INT'L L.J. 187, 189, 218-19 (1977). The early experience of the Human Rights Committee, established under Articles 28 through 34 of the Civil and Political Covenant, seems to confirm Professor Buergenthal's thesis. *See, e.g.*, Human Rights Committee Begins Consideration of Yugoslavia's Report, U.N. Press Release HR/1652, July 27, 1978. *See generally* New Human Rights Committee, INT'L COMM'N JURIS. REV., Dec. 1977, at 19; Human Rights Committee Completes Questioning on Report by Iran on Civil and Political Rights, U.N. Press Release HR/1644, July 20, 1978.

Under Article 41 of the Covenant on Civil and Political Rights, states parties may declare that they accept the competence of the Human Rights Committee to consider human rights complaints by one country against another. Article 42 provides for conciliation of any such disputes and reports of findings. Only six states, however, have thus

and Political Covenant provides a means by which individual citizens can motivate international investigations of human rights infringements.<sup>68</sup> Since no system of justice is perfect, it is important that people have recourse to international procedures such as those created by the Optional Protocol.<sup>69</sup>

This is a particularly opportune time for the United States to begin participating actively in the Covenants, because the procedures for implementing the Covenants are just now being developed. Moreover, unless the United States ratifies the Covenants, a United States citizen will not be permitted to participate in the Human Rights Committee<sup>70</sup> and will thus be unable to participate in the further definition of international human rights that will necessarily occur as the Covenants are applied.<sup>71</sup> The definition of international human rights has direct relevance for United States foreign policy because United States statutes limit aid to governments exhibiting a consistent pattern of violations of "internationally recognized human rights."<sup>72</sup> Because the Covenants are the most authoritative statement of such rights, it is critical that the United States have a hand in shaping their further development.<sup>73</sup>

In opposition to ratification, it might be argued that by ratifying

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far made such a declaration. Human Rights Ratifications, *supra* note 50, at 4, 8, 10. The President, in his letter of February 23rd, stated:

Should the Senate give its advice and consent to ratification of the International Covenant on Civil and Political Rights, I intend upon deposit of United States ratification to make a declaration, pursuant to Article 14 [sic] of the Covenant. By that declaration the United States would recognize the competence of the Human Rights Committee established by Article 28 to receive and consider "communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant."

*Message, supra* note 6, at IV. Such a declaration is to be welcomed, although the President's letter mistakenly referred to Article 14 instead of 41.

68. See Parson, *supra* note 48; note 67 *supra*.

69. See Picken, *Rights and Freedoms: The International Covenants*, MATCHBOX, Fall 1977, at 6.

70. See Covenant on Civil and Political Rights, *supra* note 2, art. 28, para. 2; International Law Association, *Ratification Now*, HUMAN RIGHTS, Summer 1978, at 36, 38; Schwelb, *supra* note 67, at 835-38.

71. See Schwelb, *supra* note 12, at 518-19.

The United States will also not be able to participate as a member of the working group that reviews reports of states parties under the Covenant on Economic, Social and Cultural Rights, although the United States government may send an observer to, and participate in discussions at, the Economic and Social Council itself. See Implementation of the International Covenant on Economic, Social and Cultural Rights, 64 U.N. ESCOR (Agenda Item 5) 19, U.N. Doc. E/L.26 (1978) (Decision E/DEC/1978/10).

72. See, e.g., 22 U.S.C. §§ 2151n(a), 2304(a)(1) (1972). See generally *Human Rights Legislation, supra* note 55, at 251, 265-67 & n.116.

73. See *Human Rights Legislation, supra* note 55, at 237 n.26.

the Covenants, the United States would lend visible support to a minimum standard of conduct that is lower than it would find desirable. For example, since the Covenants do not mention the right to property,<sup>74</sup> the United States might be considered to support that omission by ratification. It is important to first note that to the extent that the Covenants are less stringent in defining rights than United States law, they present no risk to the rights of United States citizens, because of specific provisions in both Covenants.<sup>75</sup> Moreover, while the Covenants, as presently drafted, embody fewer rights than had been envisioned by those who initially advocated the International Bill of Human Rights,<sup>76</sup> it is doubtful that the world community will, in the near future, accept a higher minimum standard.<sup>77</sup> Accordingly, the United States can best foster the cause of international human rights by ratifying the Covenants as presently written so as to be in a better position to urge ratification by other nations and enforcement of the standards contained in the two agreements.<sup>78</sup>

Another objection to United States ratification might be that by acceding to the Covenants, the United States will, in effect, be sanctioning the human rights conduct of a few nations that have ratified

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74. The absence of the right to property from the Covenant was early justified as a recognition that there existed no international consensus on this right. See Hendrick, *An International Bill of Human Rights*, 18 DEP'T STATE BULL. 195, 205 (1948) ("[N]ations will not be willing to enter into a covenant which contains rights whose definitions vary considerably in different countries."); cf. United Nations Action in the Field of Human Rights, U.N. Doc. ST/HR/2, at 99-100 (1974) ("No agreement was reached on . . . whether the right should be included in the . . . Covenant[s]."); Henkin, *The United States and the Crisis in Human Rights*, 14 VA. J. INT'L L. 653, 670-71 (1974) ("If we in the United States and elsewhere have to refine and reorder our notions of human rights, we must recognize that others may have different expressions for the same values.").

75. Covenant on Civil and Political Rights, *supra* note 2, art. 5, para. 2; Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 5, para. 2; see Chafee, *Federal and State Powers Under the UN Covenant on Human Rights*, 1951 WIS. L. REV. 390, 402 & n.24.

76. See H. LAUTERPACHT, *AN INTERNATIONAL BILL OF THE RIGHTS OF MAN* 92-165 (1945); Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, *supra* note 66, at 103, 117-23.

77. For example, the reference in Article 1 of both Covenants to international law as a limit on the right of a nation and its people to dispose of their natural wealth and resources creates a more favorable position for U.S. investors abroad than the United States would probably obtain from the General Assembly today. See Halperin, *Human Rights and Natural Resources*, 9 WM. & MARY L. REV. 770, 776-87 (1968); Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854, 855-64 (1956). See also Martin, *Human Rights and World Politics*, [1951] Y.B. WORLD AFFAIRS 37, 37-51; Przetacznik, *The Socialist Concept of Protection of Human Rights*, 38 SOC. RESEARCH 337, 345-47 (1971).

78. See *Human Rights Convention Hearings*, *supra* note 4, at 54-55 (testimony of Ambassador Goldberg); Gardner, *supra* note 45, at 908.

the treaties but nonetheless continue to violate their provisions. For example, the Soviet Union and several other Soviet bloc countries are parties to the Covenants,<sup>79</sup> yet their human rights record today continues to be marred by flagrant violations of the principles that the Covenants embody.<sup>80</sup> Far from approving the conduct of these nations, however, the United States government, by ratifying the Covenants, will be gaining a better position from which to complain of violations by other governments and to seek strict enforcement of the Covenants.<sup>81</sup>

In short, during the thirtieth anniversary year of the Universal Declaration of Human Rights,<sup>82</sup> there is no better way for the United States to celebrate its renewed commitment to the cause of human rights than to ratify the Human Rights Covenants and the Optional Protocol.

79. Human Rights Ratifications, *supra* note 50, at 2-10.

80. See, e.g., *Basket III: Implementations of the Helsinki Accords: Hearings Before the Commission on Security and Cooperation in Europe*, Vol. III, 95th Cong., 1st Sess. 19-37 (1977); *Religious Persecution in the Soviet Union: Hearings Before the Subcomm. on International Political and Military Affairs and on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976); AMNESTY INTERNATIONAL, *PRISONERS OF CONSCIENCE IN THE USSR: THEIR TREATMENT AND CONDITIONS* 138-44 (1975).

81. Gardner, *supra* note 45, at 908; Shestack & Cohen, *supra* note 61, at 689. *But see* Auerbach, *Freedom of Movement in International Law and United States Policy*, in *HUMAN MIGRATION: PATTERNS AND POLICIES* 317, 327-29 (W. McNeill & R. Adams eds. 1978).

82. The Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A 810, at 71 (1948), is a United Nations General Assembly resolution serving as the first step toward an International Bill of Human Rights, including eventually the two Human Rights Covenants and the Optional Protocol. See generally P. DROST, *HUMAN RIGHTS AS LEGAL RIGHTS* 173-74 (1951); H. LAUTERPACHT, *supra* note 76, at 75-82; N. ROBINSON, *UNIVERSAL DECLARATION OF HUMAN RIGHTS* 40-47 (1958); Hendrick, *Progress Report on Human Rights*, 19 DEP'T STATE BULL. 159, 161-64 (1948); Hendrick, *supra* note 74, at 208; MacChesney, *supra* note 61, at 209; McDougal & Behr, *Human Rights and the United Nations*, 56 AM. J. INT'L L. 603, 613-19 (1964); Schwelb, *supra* note 14, at 511-12; Schwelb, *The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol*, 12 TEX. INT'L L.J. 141, 141-45 (1977).

The Universal Declaration has exercised a profound effect upon the content of the two Covenants, other international agreements, and national constitutions. See E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 50-55 (1964) (influence of Universal Declaration); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 516-18 (1973); A. VERDOODT, *NAISSANCE ET SIGNIFICATION DE LA DECLARATION UNIVERSELLE DES DROITS DE L'HOMME* 323-24 (1964); McDougal & Behr, *supra*, at 638-39; Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 PROC. AM. SOC'Y INT'L L. 217 (1959); Whiteman, *Mrs. Franklin D. Roosevelt and the Human Rights Commission*, 62 AM. J. INT'L L. 918, 919-20 (1968). See also Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, entered into force Sept. 3, 1953, 213 U.N.T.S. 221, 222.

### III. ORIGIN OF THE PROPOSED RESERVATIONS

The overall approach of President Carter's February 23rd letter was to some extent presaged when he promised before his election: "Insofar as they comply with our own Constitution and laws, we should move toward Senate ratification of several important treaties drafted in the United Nations for the protection of human rights."<sup>83</sup> Few observers noted the importance of that qualifying phrase, however, until the new Carter Administration began to consider a so-called "general reservation" to all human rights treaties that reportedly would have subordinated all such treaties to the Constitution and laws of the United States.<sup>84</sup> Opponents of such a general reservation convincingly argued that such a sweeping reservation would make ratification meaningless, and would harm the cause of human rights.<sup>85</sup> Had the United States asserted such a general reservation, it would have been announcing, in effect, that the human rights treaties involved no binding obligations. It would also have encouraged other countries to assert similar sweeping, destructive reservations. Although opponents of the general reservation succeeded in convincing the Administration to drop the idea, the February 23rd letter bears the same approach in somewhat greater detail.

The President's letter transmitted two detailed documents signed by Warren Christopher, Deputy Secretary of State, dated December 17, 1977.<sup>86</sup> The Christopher documents first summarized the provisions of the two Human Rights Covenants, the International Convention on the Elimination of All Forms of Racial Discrimina-

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83. Address by Jimmy Carter, B'nai B'rith Convention (Sept. 8, 1976) (emphasis added) (reference to Genocide Convention, *inter alia*). President Carter did not mention this general reservation when he promised, at the United Nations, to sign and seek congressional approval of the Covenants. The President's Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 397, 401 (March 17, 1977) (describing U.S. commitment to fundamental human affairs as more than "a political posture," and promising that "[t]o demonstrate this commitment, I will seek congressional approval and sign the U.N. covenants on economic . . . and political rights.").

84. Interview with Roger Cochetti, United Nations Association in Washington, D.C. (Aug. 15, 1978). See Marcus-Helmons, *L'article 64 de la Convention de Rome ou Les Réserves à la Convention Européenne des Droits de L'Homme*, 45 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 7, 15-18 (1968).

85. *Id.*; see J. Hehir, Statement of Preference for Specific over General Reservations to the U.N. Human Rights Treaties (Oct. 4, 1977) (unpublished memorandum); P. Rengel, Response to Statement of Preference for Specific over General Reservations to the U.N. Human Rights Treaties (Oct. 28, 1977) (unpublished memorandum).

86. See *Message*, *supra* note 6, at V-XXIII. "Letter" and "message" are used interchangeably in this Article to refer to both the President's letter and the accompanying Department of State documents.

tion,<sup>87</sup> and the American Convention on Human Rights.<sup>88</sup> Then, on behalf of the Departments of State and Justice, Deputy Secretary Christopher recommended to the Senate<sup>89</sup> a series of reservations, declarations, and understandings to each of the four human rights treaties.<sup>90</sup> The overall approach of these documents may be best exemplified by the following paragraph in the President's message:

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87. Convention on Racial Discrimination, *supra* note 5.

88. American Convention on Human Rights, *supra* note 5. See also D. Fox, Report to Council Meeting, American Bar Association, Section of International Law (April 28-29, 1978) (unpublished memorandum); O. Garibaldi, Report on the Proposed Reservations, Understandings, and Declarations to the American Convention on Human Rights (April 12, 1978) (unpublished memorandum to American Society of International Law, Working Group on Ratification of Human Rights Conventions).

89. The Constitution does not explicitly authorize the Senate to formulate reservations to treaties. Article II, section two, clause two of the Constitution merely states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The Senate has, however, from the earliest days of the Constitution, adopted a practice of advising the President as to which treaty terms it will consent. See Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1176 & n.39 (1956). That practice has matured into a right of the Senate to "advise" amendments or to make acceptance conditional upon the acceptance of reservations. See *Hayer v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869); Wright, *Amendments and Reservations to the Treaty*, 4 MINN. L. REV. 14, 14-15 (1919). See generally C. BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 381 & n.5 (1902); Laws and Practices Concerning the Conclusion of Treaties, U.N. Doc. ST/LEG/SER.B/3 (1952). This latter source states,

It is the position of the Government of the United States that if the Congress of the United States of America (or the legislative body of another country) has seen fit to include a condition and reservation in the enabling law by which the Executive is empowered to accept membership in an international organization established pursuant to international agreement, the Executive must take cognizance of that condition and reservation in his execution of the instrument of acceptance. Inclusion of the condition and reservation in the instrument of acceptance will constitute official notice to the other governments concerned with respect to the legislative restriction upon United States action. The ultimate decision with respect to the question of the completeness of an acceptance of the constitution of such an international organization will be made by other governments parties to that constitution rather than by officials of the organization concerned. Failure of other governments concerned to question the adequacy of the instrument is usually taken as tacit consent.

*Id.* at 131. The subsequent steps of the United States procedure for the ratification of a treaty are set out in 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 7, at 46 (1970).

90. 14 M. WHITEMAN, *supra* note 89, § 17, at 137-38, provides basic definitions of the terms "reservation," "understanding," "declaration," and "statement":

The term "reservation" in treaty making, according to general international usage, means a formal declaration by a State, when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving State and other States party to the treaty. . . .



In view of the large number of States concerned and the disparity of view on some questions, it was not possible to negotiate treaties which were in perfect accord with the United States Constitution and law. The treaties contain a small number of provisions which are or appear to be in conflict with United States law. The most serious examples are paragraphs (a) and (b) of Article 4 of the Convention on Racial Discrimination, and Article 20 of the Covenant on Civil and Political Rights, which conflict with the right of free speech as protected by the Constitution. Reservations to these and other provisions, . . . along with a number of statements of understanding, are designed to harmonize the treaties with existing provisions of domestic law. In addition, declarations that the treaties are not self-executing are recommended. With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law. The Department of Justice is of the view that, with these reservations, declarations and understandings, there are no constitutional or other legal objections to United States ratification of the treaties.<sup>91</sup>

#### IV. THE CONTENT OF THE FEBRUARY 23rd MESSAGE

The February 23rd letter contains a number of reservations applicable to both Covenants. As indicated by the paragraph quoted above, the most serious problem for United States ratification of the Covenants concerns a possible conflict with the Freedom of Speech Clause of the first amendment to the United States Constitution.<sup>92</sup> To address this problem, the February 23rd letter proposes a reservation on that point as to both Covenants. The letter also proposes a declaration that would attempt to avoid expropriations of foreign investments, thus limiting the right of all people to utilize their national wealth and resources, by asserting that this right could only be exercised in accordance with international law.<sup>93</sup> One of the most significant of the proposed reservations would limit the effect the Covenants will have on state governments within the United States.<sup>94</sup>

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The term "understanding" is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than as a substantive reservation. . . .

The terms "declaration" and "statement" are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty.

91. *Message, supra* note 6, at VI.

92. U.S. CONST. amend I, cl. 2; *see Message, supra* note 6, at X-XII; text accompanying notes 141-52 *infra*.

93. *See Message, supra* note 6, at IX. *See also* note 77, *supra*.

94. *See Message, supra* note 6, at VIII, X-XI, text accompanying notes 153-74 *infra*.

Finally, the February 23rd letter and related documents express an understanding as to both treaties that they will not be implemented directly by United States courts, but will require legislative action before becoming enforceable.<sup>95</sup>

In addition to the reservations applicable to both Covenants, the February 23rd message proposes a series of reservations applicable only to the Civil and Political Covenant. For example, the letter proposes a reservation permitting the United States to impose capital punishment.<sup>96</sup> A reservation is also proposed to permit the imposition of a harsher penalty for an offense, even if the legislature enacts a lighter penalty after the offense was committed.<sup>97</sup> Further, the President's letter recommends a reservation limiting the effect of Article 9, paragraph (5), of the Covenant, which would have assured compensation to anyone who is unlawfully arrested.<sup>98</sup> Similarly, the message proposes a limitation, by way of an understanding, on the Covenant's prohibition against double jeopardy, allowing the federal government to prosecute persons acquitted in state courts and giving state courts the right to retry former federal defendants.<sup>99</sup>

The February 23rd message also contains a series of detailed recommendations on those parts of the Civil and Political Covenant addressing the treatment of persons accused of criminal conduct. For example, the message recommends a statement about Article 10 that would permit the United States to progressively, rather than immediately, achieve the separation in prison of accused individuals from convicted persons, and the separation of adults from juveniles.<sup>100</sup> An-

95. See *Message*, *supra* note 6, at XI, XV; text accompanying notes 176-207 *infra*.

96. *Message*, *supra* note 6, at XII; see text accompanying notes 208-210 *infra*.

97. *Message*, *supra* note 6, at XII; see text accompanying notes 211-14 *infra*.

98. *Message*, *supra* note 6, at XII; see text accompanying notes 215-17 *infra*.

99. *Message*, *supra* note 6, at XIII; see text accompanying notes 218-25 *infra*.

100. *Message*, *supra* note 6, at XII.

U.S. Courts have held that juveniles cannot be commingled with adult prisoners under the strictures of the fourth, fifth, and eighth amendments, as well as under the juvenile's right to treatment. See, e.g., *Cox v. Turley*, 506 F.2d 1347, 1352 (6th Cir. 1974); *Swansey v. Elrod*, 386 F. Supp. 1138, 1143 (N.D. Ill. 1975); *White v. Reid*, 126 F. Supp. 867, 871 (D.D.C. 1954) (by implication).

Nevertheless, such commingling of adults and juveniles—even juveniles who are awaiting trial—apparently remains a problem in the United States. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, *CHARACTERISTICS OF THE CRIMINAL JUSTICE SYSTEMS* 183-84, 191-92 (1973); Shanger, *Juvenile Institutional Litigation: The Past, Present, and Future*, 1 PRISON L. MONITOR 15 (June 1978). The President's message apparently takes the ratification of the Covenants as the occasion for seeing that separate facilities are provided for juveniles.

Similarly, for adult offenders, many jurisdictions have only one detention facility for both sentenced prisoners and pre-trial detainees. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, *STANDARDS & GOALS: CORRECTIONS* 134 (1973). In 1973 the Advi-

other understanding is recommended that would permit the United States to avoid providing an attorney for a financially able accused or for one charged with a minor offense.<sup>101</sup> Yet another would allow the United States to require an indigent defendant to make a showing that a witness is necessary before his attendance will be compelled.<sup>102</sup>

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sory Commission on Criminal Justice recommended: "Persons awaiting trial should be kept separate and apart from convicted and sentenced offenders." *Id.* at 133.

101. *Message, supra* note 6, at XIII. President Carter's "understanding" of the Covenant's right-to-counsel clause in Article 14, paragraph 3, seems to reflect the present status of the sixth amendment's right to counsel provision. In *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), the Supreme Court held that the sixth and fourteenth amendments require the states to provide appointed counsel to all indigent defendants upon whom a sentence of imprisonment will probably be imposed. Lower federal courts have since expanded on the holding of *Argersinger*, requiring the appointment of counsel to indigents where the maximum penalty for an offense is imprisonment, even though the petitioner received no more than a fine for a misdemeanor conviction. *Potts v. Estelle*, 529 F.2d 450, 454 (5th Cir. 1976); *Thomas v. Savage*, 513 F.2d 536, 537 (5th Cir. 1975) (dictum); *Geehring v. Municipal Court*, 357 F. Supp. 79, 82 (N.D. Ohio 1973). Despite expressions of concern to the contrary, *see Argersinger v. Hamlin*, 407 U.S. at 48-52 (Powell, J., concurring in result), courts have not taken the step of mandating the provision of counsel in any criminal prosecution, whether involving imprisonment or merely some stigma of "moral turpitude." Although several judges and commentators have suggested that such a step is necessary, *see, e.g., James v. Headley*, 410 F.2d 325, 334-35 (5th Cir. 1969). *See generally Bute v. Illinois*, 333 U.S. 640, 682 (1948) (Douglas, J., dissenting); Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 711-12 (1968), post-*Argersinger* courts have generally adhered to the imprisonment standard. *See, e.g., Wright v. Town of Wood*, 407 U.S. 918 (1972); *Cooper v. Fitzharris*, 551 F.2d 1162, 1164 (9th Cir. 1977); *Richmond Black Police Officers v. City of Richmond*, 548 F.2d 123, 128 (4th Cir. 1977); *United States v. White*, 529 F.2d 1390, 1394 & n.4 (8th Cir. 1976); *Potts v. Estelle*, 529 F.2d 450, 453-55 (5th Cir. 1976); *Sweeten v. Sneddon*, 463 F.2d 713, 715-16 (10th Cir. 1972). *But see Wood v. Superintendent*, 355 F. Supp. 338, 344 (E.D. Va. 1973) (balancing test should be applied case by case for petty offenses).

102. *Message, supra* note 6, at XIII.

FED. R. CRIM. P. 17(b) provides that for defendants unable to pay:

The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense.

The application of this rule to a given defendant raises a substantial equal protection question, i.e., whether the requirement that the defendant's witness must be "necessary to an adequate defense" while the prosecution may obtain any witness it desires is discriminatory.

In *Slawek v. United States*, 413 F.2d 957, 960 (8th Cir. 1969), an indigent defendant squarely raised the issue of equal protection. The defendant argued that the prosecution could and had obtained all its witnesses while he was unable to do the same under rule 17(b). The *Slawek* court denied the petitioner's contention, suggesting that the issue had been raised and litigated on direct appeal (*sub nom. Terlikowski v. United States*, 379 F.2d 501, 507-08 (8th Cir. 1967)). Simultaneously, the court side-stepped *Slawek's* argument by restating it in terms only of indigent defendant versus

In regard to the Covenant on Economic, Social and Cultural Rights, the February 23rd message proposes two understandings that seem merely to repeat the substance of Article 2, that the rights established by that Covenant should be achieved progressively rather than immediately.<sup>103</sup> The letter also asserts<sup>104</sup> an understanding that Article 2 does not require foreign economic aid, when it obligates each Party " 'to take steps,' individually and through international assistance and cooperation, 'to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized' by the Covenant 'by all appropriate means . . . ' "<sup>105</sup> To a provision in the Covenant that forbids discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"<sup>106</sup> the letter

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rich defendant. 413 F.2d at 960. A cursory analysis of the direct appeal reveals that, in fact, the argument never was litigated; the *Terlikowski* court had itself simply relied on rule 17(b) and cases which reiterated the language of this federal rule.

*Slawek and Terlikowski* are but two in a line of several cases which merely paraphrase FED. R. CRIM. P. 17(b) instead of directly examining the substantive issue it raises. See, e.g., *United States v. Eskridge*, 456 F.2d 1202, 1204 (9th Cir. 1972); *United States v. Morris*, 451 F.2d 969, 971 (8th Cir. 1971); *Hathcock v. United States*, 441 F.2d 197, 199 (5th Cir. 1971); *United States v. Zuideveld*, 316 F.2d 873, 881 (7th Cir. 1963), *cert. denied*, 376 U.S. 916 (1974). Although these cases recognize that the sixth amendment right to compulsory process is fundamental, they stress that such recognition does not necessarily include the payment of the expenses of witnesses by the Government. See *Feguer v. United States*, 302 F.2d 214, 241 (8th Cir. 1961). The right to a subpoena is not absolute, *United States v. Linn*, 460 F.2d 1274, 1276 (10th Cir. 1972); *United States ex rel. Laudati v. Ternullo*, 423 F. Supp. 1210, 1216 (D.C.N.Y. 1976), but is addressed to the sound discretion of the trial court. See *United States v. Pitts*, 569 F.2d 343, 348-49 (5th Cir. 1978); *United States v. Martin*, 567 F.2d 849, 852 (9th Cir. 1977); *Greenwell v. United States*, 317 F.2d 108, 110 (D.C. Cir. 1963).

Despite the failure of the circuit courts to address the rule 17(b) equal protection question, lower federal and state courts have examined related issues which may point the direction the higher courts could follow. Hence, in *Hebel v. State*, 60 Wis. 2d 325, 331, 210 N.W.2d 695, 699 (1973), the court held that immunity statutes which provide the government with the power to compel the testimony of a witness, but which do not afford a correlative right to the accused, are not violative of the defendant's right to equal protection. See generally *Tatman v. Delaware*, 314 A.2d 417, 418 (Del. 1973). In *State v. Wells*, 290 N.C. 425, 491-92, 226 S.E.2d 325, 330 (1976), the court issued an instant subpoena for the prosecuting witness but refused to exercise the same power on behalf of an indigent defendant to compel the presence of two alibi witnesses. The North Carolina Supreme Court held that this did not deny equal protection. *But see Davis v. Coiner*, 356 F. Supp. 695, 697 (D. W.Va. 1973).

103. See *Message*, *supra* note 6, at VIII, X.

104. See *id.* at IX.

105. *Id.*, quoting Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 2, para. 1. Such an understanding is probably unnecessary, because Article 2 does not impose an obligation to give aid. See *Schwelb*, *supra* note 76, at 110. *But see A. Blyberg*, *supra* note 59.

106. Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 2, para. 2.

proposes an understanding that would allow the United States to make distinctions on the basis of citizenship in "appropriate cases (e.g., ownership of land or of means of communication)."<sup>107</sup> Finally, the message recommends a declaration recognizing the right of property and asserting the protection of international law as to property ownership.<sup>108</sup>

## V. STANDARDS FOR EVALUATION

In order to assess the February 23rd message, it is necessary to establish the standards against which that message and its recommendations will be evaluated: the United States Constitution, international law, and a comparison with reservations by other nations.

### A. THE CONSTITUTION

The Supreme Court has stated that a treaty may not infringe upon the provisions of the United States Constitution.<sup>109</sup> There is nothing, however, in the United States Constitution, in international law, or in the previous practice of the United States that would support the February 23rd letter insofar as it evidently attempts to prevent any change in other United States laws.<sup>110</sup> Treaties and federal statutes are ordinarily considered to possess equal dignity under the United States Constitution; if they are in conflict, the most recent

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107. *Message, supra* note 6, at IX. See generally Gaffney, *Social and Economic Impacts of Foreign Investment in United States Land*, 17 NAT. RESOURCES J. 377, 392 (1977); Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 639, 644, 646, 649-50 (1976).

108. See *Message, supra* note 6, at IX. See also notes 74 and 77 *supra*.

109. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960); *Reid v. Covert*, 354 U.S. 1, 16-17 (1957). See also Newhouse, *The Constitution and International Agreements on Unilateral Action Curbing "Peace-Imperiling" Propaganda*, 31 LAW & CONTEMP. PROB. 506, 518 (1966).

110. In voting for the Covenants, the United States delegate, Patricia Harris, referred in her final statement only to the Constitution and not to other laws or practices, and

noted that the United States disagreed with the provisions of the Covenants relating to permanent sovereignty over natural resources, authorizing unequal treatment of non-nationals by the developing countries, and restricting the freedom of expression. She also pointed out that the Covenants "could not authorize or sanction any measures in the United States which do not conform to the clear provisions of the United States Constitution, such as that protecting freedom of speech, or those defining the established constitutional relationship between the Federal Government and the several States."

COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 15-16 (Eighteenth Report 1968).

Reservations may, however, be asserted for the first time at ratification. Vienna Convention, *supra* note 63, art. 19, at 291; see Owen, *Reservations to Multilateral Treaties*, 38 YALE L.J. 1086, 1096-97, 1114 (1929).

controls.<sup>111</sup> Furthermore, under the Supremacy Clause,<sup>112</sup> federal law—including treaties—controls state law if the two conflict.<sup>113</sup> The limitations proposed in the February 23rd letter that go beyond the requirements of the Constitution in protecting domestic law or practice are therefore unnecessary.<sup>114</sup>

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111. See, e.g., *Reid v. Covert*, 354 U.S. 1, 18 (1957); *Clark v. Allen*, 331 U.S. 503, 508-09 (1947); *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 160 (1934); *Fong Yue Ting v. United States*, 149 U.S. 698, 720-21 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson*, 112 U.S. 580, 597-98 (1884) (by implication); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871).

112. U.S. CONST. art. VII, para. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

113. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948); *United States v. Pink*, 315 U.S. 203, 230-31 (1942); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Hauenstein v. Lynhaum*, 100 U.S. 483, 488-89 (1880); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 52 (1852); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 463 (1819); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 270 (1817); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813); *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806); *Clerke v. Harwood*, 3 U.S. (3 Dall.) 342, 343 (1797); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244, 277 (1796); *State v. Brailsford*, 3 U.S. (3 Dall.) 1, 304 (1794). See generally *THE FEDERALIST* No. 64 (J. Jay) at 436-38 (J. Cooke, 1961); *Hartman, Federation as a Limitation on the Treaty Power of the United States, West Germany, and India*, 18 CASE W. RES. L. REV. 134, 154-55 (1966); *Sproul, Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 281-82 (1932).

114. See O. Garibaldi, *supra* note 88, at 1. See also J. BRIERLY, *THE BASIS OF OBLIGATIONS IN INTERNATIONAL LAW AND OTHER PAPERS* 176, 180 (1958).

While the reservations, understandings, declarations, and statements proposed by the February 23rd message are far more extensive and numerous than necessary, that letter does observe that with these limitations, "there are no constitutional or other legal objections to United States ratification of the treaties." *Message, supra* note 6, at VI. This statement repudiates State Department Circular 175 of 1955, which purported to find inherent constitutional impediments to ratification of the Covenants. U.S. Dep't of State, Dep't Cir. No. 175 at 2 (1955), reprinted in 50 AM. J. INT'L L. 784 (1956). Such constitutional doubts have long since been laid to rest. See Bitker, *The Constitutionality of International Agreements on Human Rights*, 12 SANTA CLARA LAW. 279, 283-90 (1972); Goldberg & Gardner, *Time to Act on the Genocide Convention*, 56 A.B.A.J. 141, 142-43 (1970); Guggenheim & Defeis, *United States Participation in International Agreements Providing Rights for Women*, 10 LOY. L.A.L. REV. 1, 22-41 (1976); Henkin, *supra* note 89, at 905-13; Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1019-32 (1968); MacChesney, *supra* note 45, at 915-17; McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 14 LAW & CONTEMP. PROB. 490, 500-04, 515-29 (1949), reprinted in 59 YALE L.J. 60, 72-77, 90-106 (1949); Nathanson, *Constitutional Problems Involved in Adherence by the United States to a*

## B. INTERNATIONAL LAW

Since the Covenants represent an international minimum standard of conduct, a government that wishes to ratify them should be very reluctant to assert that it is unwilling to abide by this standard.<sup>115</sup> A reservation to the Covenants constitutes, in effect, an admission that the country asserting it not only does not, but apparently cannot, or will not, bring its conduct up to international minimum standards.<sup>116</sup> For the United States, which has vigorously urged the assurance of basic human rights in other countries, such an admission should be embarrassing. Moreover, if the United States in ratifying the Covenants chooses to condition its acceptance upon a wide range of exceptions designed to protect its current domestic practices, other nations will be encouraged to do the same. At the

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*Convention for the Protection of Human Rights and Fundamental Freedoms*, 50 CORNELL L.Q. 235, 238-49 (1965). But see Dorsey, *Subject Matter Limitations on the Treaty Power*, 4 INT'L LAW. 209, 212-24 (1970); Fleming, *Danger to America: The Draft Covenant on Human Rights* (pts. 1-2), 37 A.B.A.J. 739, 816 (1951); Hogan, *Limitations on the Treaty Power*, 5 HASTINGS L.J. 118, 131-32 (1954); Phillips & Deutsch, *Pitfalls of the Genocide Convention*, 56 A.B.A.J. 641, 642 (1970); ABA STANDING COMMITTEE ON PEACE AND LAW THROUGH THE UNITED NATIONS, HUMAN RIGHTS CONVENTIONS AND RECOMMENDATIONS (1967), reprinted in 1 INT'L LAW. 600, 612-16, 623-24 (1967) [hereinafter cited as A.B.A. REPORT AND RECOMMENDATIONS].

The Senate's recent action supporting the ratification of the Inter-American Convention on Granting of Political Rights to Women and the U.N. Convention on the Political Rights of Women further indicates the demise of any lingering constitutional doubts about the ratification of multilateral human rights treaties. See 122 CONG. REC. S356-57 (daily ed. Jan. 22, 1976).

115. Professor Lauterpacht, who initially envisioned the Human Rights Covenants as part of the International Bill of Human Rights, strenuously opposed reservations:

The dignity and effectiveness of the Bill demands that there should be no room in it for reservations of any kind or description. The Bill of Rights is a Bill of the fundamental rights of man. The idea of any reservations to them is, *prima facie*, objectionable. In view of the numerous provisions of the Bill, of the large number of signatories, and the necessity—if they are to be legally effective—of the reservations being assented to by other signatories, the procedure for making them part of the Bill would be difficult to the point of becoming unworkable. Moreover, if reservations were to be appended in large numbers they would lend substance to the charge that governments hope to contrive to become parties to a basic international enactment without undue sacrifice.

H. LAUTERPACHT, *THE INTERNATIONAL BILL OF THE RIGHTS OF MAN* 389-90 (1950).

Professor Lauterpacht did envision the need for reservation if the Covenants became more detailed than he recommended. He also posited the possibility of transitional, short-term reservations on the federal-state issue and on sex discrimination. *Id.* at 390.

116. Cf. Moskowitz, *supra* note 63, at 230-33 (alleging that adherence to the Covenants is maintaining the status quo of accepted conduct).

very least, since treaty reservations are reciprocal,<sup>117</sup> any reservations asserted by the United States would reduce the obligations under the Covenants, not only of this country but of other parties as well.

Beyond such considerations, the use of extensive reservations to minimize the effect of a treaty on the domestic practices of the parties may contravene established principles of international law. The Vienna Convention on the Law of Treaties restates in Article 27 the fundamental relationship between domestic law and treaty law: "A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty."<sup>118</sup> Although the United States Government could formally evade this rule by incorporating domestic law into the treaty by way of reservation, such an attempt would violate the spirit of Article 27.

Furthermore, the International Court of Justice has held, in *Advisory Opinion on Reservations to the Genocide Convention*,<sup>119</sup> that reservations that undermine the essence of a multilateral treaty may vitiate any attempted ratification of the treaty. That 1951 opinion came after the Soviet Union and several other governments had attempted to ratify the Genocide Convention with unilateral reservations and the General Assembly had sought the International Court's advice as to their acceptability. The court concluded that reservations are permissible even in the absence of a treaty article speci-

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117. The effect of a reservation would be to allow other parties to the treaty to assert the same modifications of the treaty in their relations with the reserving state. See Vienna Convention *supra* note 63, art. 21, art. 20, para. 4(b) at 292; Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 RECUEIL DES COURS 230, 233, 237-68 (1958); Goldie, *The Connally Reservation: A Shield for an Adversary*, 9 U.C.L.A. L. REV. 277, 285-87 (1962); see generally Sanders, *Reservations to Multilateral Treaties Made in the Act of Ratification or Adherence*, 33 AM. J. INT'L L. 488, 491 (1939). Although the principal obligations incurred by parties to the Covenants are applicable vis-à-vis their own citizens, this reciprocal rights provision might affect the utility of the interstate complaints provision of Article 41 of the Covenant on Civil and Political Rights. Furthermore, reservations might make uniform interpretation of the treaties very difficult. See Mendelson, *Reservation to the Constitution of International Organizations*, 45 BRIT. Y.B. INT'L L. 137, 149-51, 169-71 (1971). But see Fitzmaurice, *Reservations for Multilateral Conventions*, 2 INT'L & COMP. L.Q. 1, 15-16 (1953).

118. Vienna Convention, *supra* note 63, art. 27, at 293. Similarly, the Permanent Court of International Justice has stated that "it is a generally accepted principle of international law that in relations between Powers who are contracting Parties to a treaty the provisions of municipal law cannot prevail over those of the treaty." *Advisory Opinion on The Greco-Bulgarian "Communities"*, [1930] P.C.I.J., ser. B, No. 17, at 32; see *Advisory Opinion on the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, [1932] P.C.I.J., ser. A.B., No. 44, at 24; HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 12 (A. Robertson ed. 1968) [hereinafter cited as HUMAN RIGHTS IN LAW]. See also [1962] Y.B. INT'L LAW COMM'N, 252-53, U.N. Doc. A/CN.4/SER.A/1962.

119. [1951] I.C.J. 16.



cally permitting them, but in the context of a multilateral human rights treaty, the

[o]bject and purpose of the Convention limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation or accession as well as for the appraisal by a State in objecting to the reservation.<sup>120</sup>

In other words, a reservation that is inconsistent with the object and purposes of a multilateral treaty is improper. Although the Court stated that its opinion was "necessarily and strictly limited"<sup>121</sup> to the Genocide Convention, the same considerations would appear applicable to the Human Rights Covenants.<sup>122</sup> This Article suggests that several of the proposed reservations of February 23rd conflict with the minimum standards of international human rights conduct established by the Covenants and may thus be objectionable.<sup>123</sup> Although

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120. *Id.* at 24.

121. *Id.* at 20.

122. Both the Covenants and the Genocide Convention are multilateral treaties dealing principally with a minimum human rights standard for governments vis-à-vis individuals. *See also* Comment, *The International Human Rights Treaties: Some Problems of Policy and Interpretation*, 126 U. PA. L. REV. 886, 924-25 (1978).

123. The traditional rule has been to forbid reservations to multilateral treaties unless the reservations are accepted by all the parties to the treaty. *See* Mendelson, *supra* note 117, at 141. *See also* T. BUERGENTHAL, LAW MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 24-25 (1969); J. HOLLOWAY, LES RESERVES DANS LES TRAITES INTERNATIONAUX 112-22 (1958); F. WILCOX, THE RATIFICATION OF INTERNATIONAL CONVENTIONS 47-56 (1935); Sanders, *supra* note 117, at 499. During the post-World War II period, however, this "unanimity rule" has been eroded, because of a desire to encourage universal ratification of international instruments and because of pressure from nations desirous of expressing reservations. Mendelson, *supra* note 117, at 414-45. The International Court of Justice Advisory Opinion on the Reservations to the Convention on the Prevention of Genocide, [1951] I.C.J. 16, and the later acceptance of that decision by the International Law Commission in drafting the Vienna Convention on the Law of Treaties, *supra* note 63, art. 20, at 291-92, confirmed that reservations to multilateral treaties can be made, if they are not inconsistent with the object and purpose of the treaties nor objectionable to other parties. Mendelson, *supra* note 117, at 142-46.

After the International Court of Justice's advisory opinion in the *Reservation to the Genocide Convention* case, the General Assembly adopted resolution 598 (Jan. 12, 1952), recommending that all further multilateral treaties be drafted with a provision relating to the admissibility or nonadmissibility of reservations. 6 U.N. GAOR, Supp. (No. 20) 84, U.N. Doc. A/2119 (1952). General Assembly resolution 546 (Feb. 5, 1952), also recommended that the Covenants include an article on reservations. *Id.* at 37. *See* Mendelson, *supra* note 117, at 142; Schwelb, *The United Kingdom Signs the Covenants on Human Rights*, 18 INT'L & COMP. L.Q. 457, 459 (1969).

The General Assembly considered a proposal that reservations not incompatible with the object and purposes of the Covenant concerned be deemed acceptable if no less than two-thirds of the parties did not object within three months. After discussion,

it is doubtful that the other parties to the Covenants would object to the proposed United States reservations,<sup>124</sup> the *Reservation to the Genocide Convention* opinion suggests a way of testing their propriety.

### C. RESERVATIONS BY OTHER NATIONS

Aside from the United States Constitution and international law, a third way of testing the proposed reservations in the February 23rd letter would be to compare them with the reservations made by other governments that have ratified the Covenants.<sup>125</sup> As of Septem-

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however, this proposal was withdrawn. See 6 U.N. GAOR, C.6 (267th mtg.) 85, U.N. Doc. A/C.6/SR.267 (1952). The result of the withdrawal is unclear, but the better view is probably that parties may assert reservations consistent with such international law principles as are set forth in the *Reservation to the Genocide Convention* opinion, *supra*, and the Vienna Convention, *supra* note 63. See Jenks, *supra* note 14, at 808; Schwelb, *supra* note 76, at 113-14. See also American Convention on Human Rights, *supra* note 5, art. 75.

Reservations to treaties that establish international enforcement machinery raise particularly difficult problems. In essence, by expressing such a reservation, a nation is seeking special treatment which contradicts the principle of sovereign equality among nations. See Mendelson, *supra* note 117, at 146-48, 169-70.

If there are objections to the United States reservations, article 20, para. 4(b) of the Vienna Convention, *supra* note 63, indicates that the Covenants will not be in force between the United States and the objecting nation. See note 117 *supra*. If such a pattern prevails, the Covenants would be torn asunder by a lack of uniformity in decisions and by a series of partial or relative members. See Mendelson, *supra* note 117, at 149-51, 169-71.

124. The Soviet Union and its allies, for example, would be unlikely to object to the United States reservations because they have long stressed "the indisputable right of a State to make reservations." *Resolutions of the General Assembly Concerning the Law of Treaties*, [1963] Y.B. INT'L L. COMM'N 21, para. 21, U.N. Doc. A/CN.4/SER.A/1963/Add.1. See ACADEMY OF SCIENCES OF THE U.S.S.R. INSTITUTE OF STATE AND LAW, INTERNATIONAL LAW 270 (1961); D. KAPPELER, LES RESERVES DANS LES TRAITES INTERNATIONAUX 36-37 (1958); Carey, *Implementing Human Rights Conventions—the Soviet View*, 53 KY. L.J. 115, 122 (1964). See also, Mendelson, *supra* note 117, at 142.

Nations generally abstain from objecting to the reservations of other governments, in the expectation that this restraint will be reciprocal and will encourage more universal participation in multilateral treaties. For example, there have not yet been any objections to the reservations asserted by the states parties to the Covenants. See notes 125-38 *infra* and accompanying text. In addition, because of inertia and the lack of a central decision-making forum, and because Article 20 of the Vienna Convention provides a relatively short one year period in which objections may be made to reservations, *supra* note 63, art. 20, at 292, it is unlikely that other nations will object. See Mendelson, *supra* note 117, at 148-49; Schroth & Mueller, *Racial Discrimination: The United States and the International Convention*, 4 HUMAN RIGHTS 171, 195 (1971). But see Note, *The Effect of Objections to Treaty Reservations*, 60 YALE L.J. 728, 733 (1951).

125. See C. Ferguson, *The International Status of the Covenants on Human Rights and the Optional Protocol* (1977) (unpublished draft). Ferguson describes the various reservations in great detail, and his description served as the initial basis for the analysis contained in this section of the Article.

ber 15, 1978, 54 states had ratified the Covenant on Economic, Social, and Cultural Rights, of which 22 had expressed reservations.<sup>126</sup> Similarly, 52 had ratified the Civil and Political Covenant; 24 had asserted reservations.<sup>127</sup> Initially, then, it can be observed that about half the ratifying nations felt no need to make any reservations. Furthermore, most reservations expressed by other nations did not deal with the domestic application of the treaties, but with the treaties' application to other countries, for example, refusing to recognize Israel's participation in the treaties.<sup>128</sup>

To the Economic, Social and Cultural Covenant, only 9 of the 54 ratifying nations submitted reservations or understandings that limited the domestic application of that treaty. None asserted reservations as sweeping and numerous as those proposed by the United States.<sup>129</sup> These limited reservations made by other ratifying nations may easily be summarized. Four countries—Barbados, Madagascar, Rwanda, and the United Kingdom (as to some of its colonies)—made reservations as to their financial ability to provide free primary education.<sup>130</sup> Four nations—Barbados, Kenya, Malta, and the United Kingdom (as to two of its colonies)—made reservations as to the care they might provide to mothers before and after birth.<sup>131</sup> Two nations—Barbados and the United Kingdom (for itself and for several of its colonies)—expressed reservations as to the principle of

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126. Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977, U.N. Doc. ST/LEG/SER.D/11, at 99-104 (1978) [hereinafter cited as Multilateral Treaties]. The material in this publication has been updated through September 15, 1978, by reference to unpublished, untitled, and unnumbered working documents of the Office of Legal Affairs of the United Nations. These documents will eventually be issued by the United Nations as an inclusion in the next version of the cited publication.

127. *Id.* at 105-110.

128. The countries making a reservation over the application of the Covenants to Israel included Iraq, Libya, and Syria. *Id.* at 102-04, 108.

In addition, Bulgaria, Byelorussia, Czechoslovakia, the German Democratic Republic, Guinea, Hungary, Mongolia, Romania, the Ukrainian Soviet Socialist Republic, the Soviet Union, and Syria have filed almost identical reservations as to Article 48 of the Covenant on Civil and Political Rights, *supra* note 2, and Article 26 of the Covenant on Economic, Social and Cultural Rights, *supra* note 1, which limit those nations that may become parties to the Covenants. These reservations note that there are a few nations that cannot become parties because they are not members of the United Nations, are not parties to the Statute of the I.C.J., and have not been invited by the General Assembly. Multilateral Treaties, *supra* note 126, at 102-04, 106-08.

129. Multilateral Treaties, *supra* note 126, at 102-04. The United Kingdom submitted a substantial list of nine reservations and understandings, but almost all concerned the application of the treaty to British colonies. See Schwelb, *supra* note 123, at 460-67.

130. Multilateral Treaties, *supra* note 126, at 102-04.

131. *Id.*

equal pay for equal work.<sup>132</sup> Denmark and Sweden made reservations as to providing pay for public holidays.<sup>133</sup> And Norway qualified the right to strike clause by saying that the provision would be interpreted as being compatible with the requirement of submitting labor disputes to the State Wages Board.<sup>134</sup>

By comparison, the February 23rd letter proposes that the United States assert four understandings, two reservations, one declaration, and one declaration and understanding with respect to ratification of the Covenant on Economic, Social and Cultural Rights.<sup>135</sup> The most important of these understandings, reservations, statements, and declarations will be analyzed in the next section of this Article.

In regard to the Civil and Political Covenant, 11 states out of the 52 that have ratified that treaty expressed domestically-oriented reservations or statements.<sup>136</sup> None of those countries asserted reservations or statements as to more than seven subjects. The respective total number of reservations and understandings by those eleven nations are as follows: Finland (7), United Kingdom (6) and its colonies (6), Austria (6), Italy (6), Federal Republic of Germany (6), Denmark (5), Norway (5), Sweden (3), Guyana (2), Venezuela (1), and Barbados (1).<sup>137</sup>

The February 23rd letter proposes, by comparison, that the United States assert reservations as to five subjects, understandings on four subjects, two declarations, and one statement limiting the application of the Civil and Political Covenant in this country.<sup>138</sup>

Quantitative comparisons provide only a sketchy impression of the propriety of the limitations proposed in the February 23rd letter. A more meaningful impression is obtained by analyzing some of the important proposed reservations, understandings, declarations, and statements.

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132. *Id.* at 102, 104.

133. *Id.* at 102-03.

134. *Id.* at 103.

135. *Message, supra* note 6, at VIII-XI.

136. *Multilateral Treaties, supra* note 126, at 105-10.

137. *Id.* at 105-10. In addition, Chile and the United Kingdom (for Northern Ireland) made declarations under Article 4 of the Covenant on Civil and Political Rights, *supra* note 2, that a public emergency existed requiring the derogation of certain specified rights. See *Multilateral Treaties, supra* note 126, at 106, 109-10. As to the effectiveness of these later declarations, see *Ireland v. United Kingdom*, Eur. Ct. of Human Rights (1978), reprinted in 17 INT'L LEGAL MATERIALS 680, 706-09 (1978); *Protection of Human Rights in Chile*, 31 U.N. GAOR, Ad Hoc Working Group on the Situation of Human Rights in Chile, U.N. Doc. A/31/253 (1976).

138. *Message, supra* note 6, at XI-XV.

VI. THE PROPOSED RESERVATIONS<sup>139</sup>

## A. FREEDOM OF SPEECH

The February 23rd letter proposes a reservation that would prevent either Covenant from conflicting with the free speech provision of the United States Constitution's first amendment.<sup>140</sup> Article 20 of the Civil and Political Covenant forbids "propaganda for war" and "advocacy of national, racial or religious hatred."<sup>141</sup> In addition, paragraph (1) of Article 5 in both Covenants contain almost identical language:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.<sup>142</sup>

Because a treaty cannot be ratified if it conflicts with the Constitution,<sup>143</sup> there may well be a need for the United States to express a reservation with respect to these provisions.<sup>144</sup> Article 20 of the Civil and Political Covenant obviously involves a balancing of human rights values. Advocates of human rights could reasonably differ as to where one should strike a balance between freedom of speech (protected by the first amendment of the Constitution<sup>145</sup> and by the "freedom of expression" clause of Article 19 of the Covenant on Civil and Political Rights)<sup>146</sup> and freedom from racial hatred.<sup>147</sup> Five of the

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139. From among the substantial number of proposed reservations, understandings, declarations, and statements, this Article selects a few of the most important and focuses on them as a means of analyzing the over-all approach taken by the February 23rd letter.

140. *Message*, *supra* note 6, at X-XII.

141. Covenant on Civil and Political Rights, *supra* note 2, art. 20.

142. *Id.*, art. 5, para. 1; Covenant on Economic, Social and Political Rights, *supra* note 1, art. 5, para. 1.

143. See authorities cited in note 109 *supra*.

144. See Bitker, *supra* note 114, at 287-88; MCPL Education Fund, The U.N. Human Rights Covenants and U.S. Foreign Policy 22 (1978) (unpublished draft by Members of Congress for Peace Through Law).

145. U.S. CONST. amend. I, cl. 2.

146. Covenant on Civil and Political Rights, *supra* note 2, art. 19, para. 2.

147. The area of conflict between the first amendment and Article 20 can, however, be so narrowed as to require a much less sweeping reservation than that proposed by President Carter. See Seeley, *Article Twenty of the International Covenant on Civil and Political Rights: First Amendment Comments and Questions*, 10 VA. J. INT'L L. 328, 343-45 (1970). See also Newhouse, *supra* note 109 at 525; Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROB. 532, 540-49 (1966). The United States need only assert a restriction that to the extent the first amendment conflicts with Article 20, the first amendment would control.

nations that have ratified the Civil and Political Covenant have also expressed reservations to Article 20.<sup>148</sup>

While some reservation may be needed to Article 20 of the Civil and Political Covenant, however, the February 23rd letter proposes a sweeping reservation that does not end with solving the first amendment problem, but also unnecessarily limits paragraph (1) of Article 5 in both treaties by referring to the Constitution, *laws, and practice* of the United States:

The Constitution of the United States and Article 19 of the International Covenant on Civil and Political Rights contain provisions for the protection of individual rights, including the right to free speech, and nothing in this Covenant shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States.<sup>149</sup>

At the outset, it is difficult to determine what "laws and practice" the February 23rd letter is seeking to protect that would not be amply protected by a simple reference to the first amendment. Beyond this, the proposed reservation, which appears aimed at ensuring greater protection of speech than exists under the Covenants, might perversely be used to justify United States "laws and practice" that are *less* protective of freedom of speech than Article 19 of the Civil and Political Covenant. For example, the United States Supreme Court has upheld against first amendment challenge "laws and practice" that require unpopular political parties to provide a list of their supporters to the government,<sup>150</sup> allow police surveillance of peaceful demonstrations,<sup>151</sup> and forbid unpopular speakers from entering the United States to give speeches.<sup>152</sup> Since Article 19 could be interpreted to prohibit such government interference, the proposed reservation may actually offer less protection for freedom of expression than the original Covenants.

## B. FEDERALISM

Article 28 of the Civil and Political Covenant and Article 50 of the Covenant on Economic, Social and Cultural Rights state, "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."<sup>153</sup> The February 23rd

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148. Denmark, Finland, Norway, Sweden, and the United Kingdom have expressed reservations as to Article 20. Multilateral Treaties, *supra* note 126, at 107-09.

149. *Message*, *supra* note 6, at X.

150. *Buckley v. Valeo*, 424 U.S. 1, 84 (1976).

151. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

152. *Kleindienst v. Mandel* 408 U.S. 753, 770 (1972).

153. Covenant on Civil and Political Rights, *supra* note 2, art. 28; Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 50.

letter proposes reservations that directly conflict with the language of Articles 28 and 50, and thus would substantially limit the impact of the Covenants on state governments within the United States:

The United States shall [progressively<sup>154</sup>] implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant.<sup>155</sup>

This reservation might be found unacceptable under international law as vitiating an essential component of the treaty,<sup>156</sup> in which case a substantial question would arise as to the effectiveness of any United States ratification that includes such a reservation. Treaties, particularly bilateral instruments, have traditionally been considered analogous to contracts between states.<sup>157</sup> Under traditional doctrine, a treaty cannot be valid unless mutually consented to by competent parties.<sup>158</sup> If, in consenting to a treaty, the United States attaches certain reservations, those reservations are analogous to counter-offers to a contract and must be accepted by the other parties in order to form a binding agreement.<sup>159</sup> Accordingly, if one or more of the reservations interposed by the United States are not accepted by the other states that are parties to a treaty, or if the reservations are otherwise considered improper, it might be contended that agreement is lacking and thus that no treaty is formed.<sup>160</sup>

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154. The reservation to Article 50 of the Covenant on Economic, Social and Cultural Rights, *supra* note 1, inserts the word "progressively" at this point in the text. Otherwise the reservations are identical. *Compare Message*, *supra* note 6, at X-XI, with *id.* at XIV-XV.

155. *Id.* at XIV.

156. See generally H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 359-64 (1950).

157. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121, 121-23 (1920) [hereinafter cited as *Peace Treaty*]; Wright, *supra* note 89, at 17.

158. *Peace Treaty*, *supra* note 157, at 121.

159. RESTATEMENT (SECOND) OF CONTRACTS § 38, at 88 (Tent. Drafts Nos. 1-7, 1973); Note, *supra* note 124, at 728-29 & n.3.

160. Modern multilateral treaties, however, partake both of international legislation and of contract. See Anderson, *Reservations to Multilateral Conventions: A Re-examination*, 13 INT'L & COMP. L.Q. 450, 477 (1964); Brierly, *The Codification of International Law*, 47 MICH. L. REV. 2, 3-4 (1948); Lauterpacht, *Report to the International Law Commission on the Law of Treaties*, [1953] Y.B. INT'L L. COMM'N 123, 127, U.N. Doc. A/CN.4/SER.A/1953/Add. 1; Owen, *Reservations to Multilateral Treaties*, 38 YALE L.J. 1086, 1086-87, 1094, 1105 (1929); Sohn, *supra* note 14, at 135; Note, *supra* note 124, at 731-32. Accordingly, traditional contract theories may be insufficient to

Beyond this potential problem, there is considerable question about the need for such a reservation. In the early negotiations leading to the drafting of the Human Rights Covenants and other international agreements relating to human rights, the United States at first insisted upon treaty language that would have exempted the states from the impact of these treaties.<sup>161</sup> Later, as the force of states' rights positions in this country decreased, United States representatives dropped their insistence upon such a federal-state clause.<sup>162</sup> The proposed reservation reasserted this anachronistic concern.

Although there may have been some doubt in the early 1950's as to the authority of the federal government to legislate in many of the areas covered by the Covenants,<sup>163</sup> those doubts have been resolved largely in favor of federal power.<sup>164</sup> In view of the civil rights legislation of the past twenty years,<sup>165</sup> it is clear that the federal government

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explain the consequences of an improper or unaccepted reservation. See Fenwick, *Reservation to Multilateral Conventions*, 46 AM. J. INT'L L. 119, 122 (1952). Perhaps, the United States would remain bound by a ratified multilateral treaty even though some of its reservations are not accepted or otherwise held invalid. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 137, at 503 (Proposed Official Draft 1962) (Reporters' Note). See also Riesenfeld, *The Power of Congress and the President in International Relations—Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 652-53 (1937).

In *Power Authority v. Federal Power Comm'n*, 247 F.2d 538, 543-44 (D.C. Cir. 1957), vacated as moot *sub nom.* *American Power Ass'n v. Power Auth.*, 355 U.S. 64 (1957), it was suggested that an inoperative reservation will not vitiate the accompanying ratification. The reasoning of that decision, which relies upon *New York Indians v. United States*, 170 U.S. 1, 22-23 (1898), is subject to considerable question, because both parties to the treaty in *New York Indians* proceeded to conduct themselves under the treaty even though the purported reservation was not fulfilled. See Henkin, *supra* note 89, at 1176-81.

161. See M. GANJI, *supra* note 61 at 212-20; Liang, *Notes on Legal Questions Concerning the United Nations*, 45 AM. J. INT'L L. 108, 121-24 (1951); MacChesney, *supra* note 61, at 218; Simsarian, *Progress in Drafting Two Covenants on Human Rights*, 46 AM. J. INT'L L. 710, 716-17 (1952). The United States also initially voted for a federal-state clause in the Convention on Racial Discrimination, *supra* note 5.

162. The United States apparently changed its position and voted for the deletion of such clauses. See 21 U.N. GAOR, C.3 (1411th mtg.) 199, U.N. Doc. A/C.3/SR. 1411 (1966) (deletion of article 28). See generally Schwelb, *supra* note 76, at 127 n.55; Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1054 n.67 (1966); see also A.B.A. REPORT AND RECOMMENDATIONS, *supra* note 114, at 624.

163. See Chafee, *supra* note 75, at 422-24; Fleming, *supra* note 114, at 816. See also *Williams v. United States*, 341 U.S. 70, 77 (1951).

164. See note 114 *supra*.

165. See, e.g., Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19, 3631 (1976); 18 U.S.C. § 245(b); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to 2000h-6 (1977); Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1973 (1977); 25 U.S.C. §§ 1301-1341 (1977) (constitutional rights of American Indians).



has the power under the commerce clause,<sup>166</sup> as well as the enforcement clauses of the thirteenth,<sup>167</sup> fourteenth,<sup>168</sup> and fifteenth amendments<sup>169</sup> to legislate in the areas covered by the Covenants. Only where the federal government attempts to interfere in "integral governmental functions of [state] bodies,"<sup>170</sup> such as the relations between a state and its employees, would there now be any question of federal legislative authority.

Furthermore, if there remains any residual doubt about federal authority, the Supreme Court's decision in *Missouri v. Holland*<sup>171</sup> would support the Human Rights Covenants as valid exercises of the treaty power, even without other basis for federal action.<sup>172</sup> In *Missouri v. Holland*, the Court rejected the argument that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."<sup>173</sup> Instead, the Court noted that under the Constitution "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."<sup>174</sup> The Court then concluded that since the treaty did not contravene any express prohibition of the Constitution, it was not invalid simply because it might infringe on rights otherwise reserved to the states under the tenth amendment.<sup>175</sup>

### C. SELF-EXECUTING NATURE OF THE COVENANTS

The Supremacy Clause of the United States Constitution has been interpreted by the Supreme Court to assure not only that treaties are the supreme law of the land, but also that, at least in some circumstances, they may be considered laws applicable by the courts without implementing legislation.<sup>176</sup> Accordingly, some treaty provi-

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166. U.S. CONST. art. I, § 8, cl. 2; see, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964).

167. U.S. CONST. amend. XIII, § 2; see, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-40 (1968).

168. U.S. CONST. amend. XIV, § 5; see, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259-60 (1964).

169. U.S. CONST. amend. XV, § 2; see, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

170. *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

171. 252 U.S. 416, 432-34 (1920); cf. H. LAUTERPACHT, *supra* note 156, at 157-58 (discussing application of *Missouri v. Holland* to enforcement of the U.N. Charter).

172. See note 114 *supra*.

173. 252 U.S. at 432.

174. *Id.* at 433; U.S. CONST. art. VI, para. 2.

175. 252 U.S. at 434.

176. In *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), the Supreme Court construed the supremacy clause, U.S. CONST. art. VI, para. 2, as follows:

Our constitution declares a treaty to be the law of the land. It is, conse-

sions are considered to have immediate domestic consequences (self-executing);<sup>177</sup> while other treaty provisions require legislative action to carry them into effect (not self-executing).<sup>178</sup> Whether or not a treaty is self-executing—and, therefore, to be treated as law without the need for legislative action—is initially a question for the President, who is constitutionally obligated to “take Care that the Laws be faithfully executed.”<sup>179</sup> But, while the views of the Executive are given great weight, the issue has been considered as ultimately one for the courts, which must determine whether to give the treaty effect as law without legislative implementation.<sup>180</sup>

The February 23rd letter, however, attempts to remove this difficult issue from the courts by asserting a declaration to both treaties that the Covenants are not self-executing.<sup>181</sup> The effect of this declaration is to deprive American courts of their most potent technique for contributing meaningfully to the interpretation of the Human Rights Covenants.<sup>182</sup> If the Covenants are self-executing, litigants

quently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

*Id.* at 314. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141, at 432-40 (1965), Comments a-f, Reporters' Notes 1-3; Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178, 185 (1954); McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 748-53 (1958); Sørensen, *Obligations of a State Party to a Treaty as Regards its Municipal Law*, in HUMAN RIGHTS IN LAW, *supra* note 118, at 11, 23.

177. See, e.g., *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

178. Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 645 & n.12 (1951); Note, *The U.N. Covenants on Human Rights and the Domestic Law of the United States*, 48 B.U.L. REV. 106, 110 & n.41 (1968).

179. U.S. CONST. art. II, § 3; see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 158 (1972).

180. See *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 416 (1840); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154, at 471-75 (1965); HENKIN, *supra* note 179, at 158.

181. *Message*, *supra* note 6, at VIII, XV.

182. See generally A. BLECKMANN, *BEGRIFF UND KRITERIEN DER INNERSTAATLICHEN ANWENDBARKEIT VÖLKERRECHTLICHER VERTRÄGE* 17-41 (1970); L. SOHN & T. BUERGENTHAL, *REGIONAL CONVENTIONS ON PROTECTION OF HUMAN RIGHTS* 1238-40 (1973); Buerghenthal, *The Domestic Status of the European Convention on Human Rights: A Second Look*, 7 J. INT'L COMM'N JURIS. 55, 94-95 (1966); Drzemczewski, *The Domestic Status of the European Convention on Human Rights: New Dimensions*, 1977/1 LEGAL ISSUES OF EUROPEAN INTEGRATION 22-65; Preuss, *The Execution of Treaty Obligations Through International Law—Systems of the United States and of Some Other Countries*, 44 PROC. AM. SOC. INT'L L. 832, 887-96 (1951); Robertson, *The United*

may use these treaties to support their positions.<sup>183</sup> In furthering their specific interests, litigants may discover many possible applications for the Covenants that might otherwise be overlooked by the slow moving and very rudimentary international enforcement procedures established by the Covenants.<sup>184</sup> With a whole world to watch, the international procedures can probably be expected to focus only on the most serious human rights problems. If the Covenants are self-executing, however, every lawyer in the United States is potentially a watchdog for human rights.<sup>185</sup> The final result of making the Covenants not self-executing can only be to diminish substantially the impact of the treaties in the United States.

Beyond this, the propriety and legality of the proposed declarations are at least questionable. Over the years, courts have used, and commentators have advocated, various standards for determining the extent to which a treaty ought to be considered self-executing.<sup>186</sup> For example, in the much cited opinion of *Foster v. Neilson*,<sup>187</sup> Chief Justice Marshall looked principally at the language of a bilateral treaty in determining that it was not sufficiently definite and compulsory to be self-executing.<sup>188</sup> Only four years later, however, Chief

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*Nations Covenant on Civil and Political Rights and the European Convention on Human Rights*, 43 BRIT. Y.B. INT'L L. 21, 23 (1970).

183. See, e.g., *Saipan v. Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), cert. denied, 420 U.S. 1033 (1975); 10 TEX. INT'L L.J. 138, 141 (1975).

184. See F. Newman, *How International Human Rights Cases are Won and Lost—A Guidebook for Lawyers and NGOs* 2-4 (July 9, 1977) (unpublished draft).

185. See generally Lillich, *The Enforcement of International Human Rights Norms in Domestic Courts*, in J. TUTTLE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 105, 105 nn.1 & 2 (1978); Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights*, 12 TEX. INT'L L.J. 293, 316-17 n.104 (1977); Comment, *Public Interest Litigation and United States Foreign Policy*, 18 HARV. INT'L L.J. 375, 375 n.1, 398 n.86 (1977); Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 595-98 (1949).

186. See L. WILDHABER, *TREATY MAKING POWER AND CONSTITUTION* 201-02 (1971); Chafee, *Legal Problems of Freedom of Information in the United Nations*, 14 LAW & CONTEMP. PROB. 545, 563 (1949); Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 1951 PROC. AM. SOC. INT'L L. 66, 74; 2 STAN. L. REV. 797, 806 (1950); 100 U. PA. L. REV. 1247, 1248 (1952).

187. 27 U.S. (2 Pet.) 253, 314 (1829).

188. *Id.* See also *Valentine v. United States ex rel. Neidecker* 299 U.S. 5, 10-11 (1936); *Sei Fujii v. State*, 38 Cal. 2d 718, 721-22 (1952); Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 PROC. AM. SOC. INT'L L. 66, 74 (1951); Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543, 545 (1950); see generally *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); Hyman, *Constitutional Aspects of the Covenant*, 14 LAW & CONTEMP. PROB. 451, 468 (1949); Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 110, 116-27, 140-49 (1973); Note, *Self-Execution of Treaties Under the United States Constitution*, 26 COLUM. L. REV. 859, 864-66 (1926); Comment, *Treaties—United Nations Charter Invalidates Alien Land Law*, 35 MINN. L. REV. 333, 337-38 (1951).

Justice Marshall reversed his conclusion as to the same bilateral treaty, based upon a review of the history of negotiations indicating that the parties apparently intended the treaty to be self-executing.<sup>189</sup>

In regard to a multilateral treaty, by contrast, it is doubtful whether the intent of the parties manifested either at drafting<sup>190</sup> or in ratification<sup>191</sup> should serve as the appropriate standard of evaluation. The interest of only a few parties to a multilateral treaty should not control its self-executing effect.<sup>192</sup> Professor Riesenfeld has suggested, instead, that a multilateral treaty ought to be deemed self-executing if it "(a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision."<sup>193</sup>

189. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833). *See also* *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 710-12 (1832).

190. *See Schluter*, *supra* note 188, at 128-31. *But see* Schachter, *supra* note 178, at 646-48; J. O'Connell, *Implementation of the International Covenant on Civil and Political Rights: Timing and Mode of Execution* 1-2 (Apr. 20, 1978) (unpublished report on file with the author) (suggesting that preparatory work on the Covenant constitutes an important source of evidence in determining its mode of execution).

191. *Schluter*, *supra* note 188, at 131-32.

192. *See id.* at 128-31.

During the drafting process, the United States delegation sought to ensure that the Covenant on Civil and Political Rights would not be self-executing by supporting language in Article 2 that would have required parties to adopt legislation or other measures within a reasonable time. The delegation also insisted upon a footnote in the Drafting Committee Report that the Covenant is not self-operative. *See* 17 U.N. GAOR, C.3 (1182nd mtg.) 239, para. 4, U.N. Doc. A/C.3/SR. 1182 (1962). The "within a reasonable time" language was eventually deleted because it would have postponed, perhaps indefinitely, the obligations prescribed in the Covenant. *See* Schwelb, *The Nature of the Obligations of the States Parties to the International Covenant on Civil and Political Rights*, 1 PROBLEMES DE PROTECTION INTERNATIONALE DES DROITS DE L'HOMME, 301, 316-17 (1969) [hereinafter cited as *Obligations*]. *See also* Hendrick, *An International Bill of Human Rights*, 18 DEPT. ST. BULL. 195, 206 (1948); MacChesney, *International Protection of Human Rights in the United Nations*, 47 NW. U.L. REV. 198, 217 (1952).

The Drafting Committee also failed to state that the Covenant was not self-executing. Instead, the Report indicated only that the Committee had "agreed to point out in its Report its view that the Covenant is not self-executing." *Obligations*, *supra*, at 314. It is not at all clear that the inserted footnote expresses the intent of the Covenant, rather than a concession to the insistence of one delegation. *Obligations*, *supra*, at 316-17. Indeed, U.S. courts have found clauses in treaties to be self-executing even when it was contemplated that entire additional treaties would be prepared to elaborate a clause. Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 654 & nn.60-61 (1951).

193. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971); *see* Riesenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community*, 67 AM. J. INT'L L. 504, 507 (1973); Riesenfeld, *supra* note 160, at 649-51.

Applying this approach, it is possible to discern from the language of the two Covenants a marked difference in their immediacy of application.<sup>194</sup> Article 2 of the International Covenant on Economic, Social and Cultural Rights sets forth the obligation of each party "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>195</sup> This conditional, "progressive" language may be contrasted with the far more direct words of Article 2 of the International Covenant on Civil and Political Rights that clearly establishes an immediate obligation for all parties to the Civil and Political Covenant.<sup>196</sup>

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>197</sup>

But it is not clear whether this Covenant is self-executing or, instead, requires only that the ratifying governments promptly enact implementing legislation.<sup>198</sup> Article 2, when read together with the substantive provisions of the Covenant on Civil and Political Rights, meets at least the first two of Professor Riesenfeld's three standards. It both concerns the rights of individuals<sup>199</sup> and does not constitutionally require legislative implementation,<sup>200</sup> as would a provision calling for

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194. See Schwelb, *supra* note 76, at 107-10.

195. Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 2, para. 1.

196. See *Obligations*, *supra* note 192, at 314-17; see also Jenks, *supra* note 14, at 812.

197. Covenant on Civil and Political Rights, *supra* note 2, art. 2, paras. 1-2.

198. See Robertson, *The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights*, 43 BRIT. Y.B. INT'L L. 21, 25-26 (1970); Simsarian, *Progress in Drafting Two Covenants on Human Rights in the United Nations*, 46 AM. J. INT'L L. 710, 715 (1952).

199. See text accompanying note 193, *supra*; Schluter, *supra* note 188, at 149-51. See, e.g., *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108-09 (1801).

200. See note 178 *supra*; Schluter, *supra* note 188, at 132-35.

an exercise of the spending power<sup>201</sup> or the imposition of some criminal sanction.<sup>202</sup>

The language of paragraph (1) of Article 2 seems to impose an immediate obligation. Paragraph (2) requires a government to "take the necessary steps, in accordance with its constitutional process . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."<sup>203</sup> Since paragraph (2) expressly refers to legislative action, a question is raised as to whether legislation thus becomes the sole means of fulfilling the government's obligation under the treaty. Article 2, however, also refers to "other measures" "in accordance with" a state's "constitutional processes." Court action could be one of these "other measures."<sup>204</sup>

Many of the individual operative clauses of the Covenant on Civil and Political Rights are also phrased in the language of immediately effective obligation. For example, there would be no need for legislation to implement Article 11, which provides, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."<sup>205</sup> Other clauses may be less clear in demanding immediate judicial enforcement.<sup>206</sup>

Because much of the language in the Covenants denotes self-execution, and because self-execution provides an effective means of enforcement, it is improper for the United States to assert a declaration that categorically denies that effect. Just as United States courts have examined each article of the United Nations Charter separately to determine its self-executing effect,<sup>207</sup> so too should the courts be

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201. See Note, *supra* note 188, at 866-67.

202. See Henry, *When is a Treaty Self-Executing?*, 27 MICH. L. REV. 776, 782 (1929).

203. Covenant on Civil and Political Rights, *supra* note 2, art. 2, para. 2.

204. See Schluter, *supra* note 188, at 152-62.

205. Covenant on Civil and Political Rights, *supra* note 2, art. 11.

206. For example, the first clause of Article 8, para. 1, clearly requires no further legislative action: "No one shall be held in slavery; . . ." Covenant on Civil and Political Rights, *supra* note 2, art. 8, para. 1. The second clause, however, insofar as it calls for criminal sanctions, would presumably require legislative confirmation: "[S]lavery and the slave trade in all their forms shall be prohibited." *Id.* art. 8, para. 1; see Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 644-46 & n.11 (1951).

207. See, e.g. *Aquilar v. Standard Oil Co.*, 318 U.S. 724, 738 (1943) (concurring opinion) (Article 2, para. 1, self-executing); *Saipan v. Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (Article 73, self-executing); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (Article 2, para. 4, self-executing); *Callas v. United States*, 253 F.2d 838, 843 (2d Cir. 1958) (dissenting opinion) (Articles 87 and 88, self-executing); *United States v. Fitzpatrick*, 214 F. Supp. 425, 431 (S.D.N.Y. 1963) (Article 105, not self-executing); cf. *Keeney v. United States*, 218 F.2d 843, 844-45 (D.C. Cir. 1954) (Articles 100 and 105, self-executing).

allowed to consider each Article of the Covenant on Civil and Political Rights.

#### D. CAPITAL PUNISHMENT

Article 6 of the Covenant on Civil and Political Rights does not abolish capital punishment, but it does forbid the death penalty for youths under 18 years of age and for pregnant women, and also assures that pardon may be available in all death penalty cases and that the death penalty may be imposed only for the "most serious crimes."<sup>208</sup>

The February 23rd letter proposes a reservation to Article 6 that would preserve the right of the United States to impose capital punishment on any person, including children and pregnant women, without the availability of pardon, and for insignificant crimes: "The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment."<sup>209</sup> A few states may have provisions that would be affected by Article 6 of the Covenant on Civil and Political Rights,<sup>210</sup> but in asserting this reservation, the February 23rd

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208. Covenant on Civil and Political Rights, *supra* note 2, art. 6, paras. 2-5.

209. *Message*, *supra* note 6, at XII.

210. Of the thirty-two states that have laws imposing capital punishment, as of November 1, 1978, sixteen have legislation staying the execution of a pregnant woman until after the birth of her child. *See* ALA. CODE tit. 15, § 15-18-86 (1975); ARK. STAT. ANN. § 43-2622 (1977); CAL. PENAL CODE §§ 3705-3706 (West, 1970); FLA. STAT. ANN. § 922.08 (West, 1973); GA. CODE ANN. § 27.1520 (1978); IDAHO CODE §§ 19-2713 to -2714 (1948); IND. STAT. ANN. §§ 35-1-46-20 to -22 (Burns, 1975); KY. REV. STAT. ANN. § 431.240 (Baldwin, Supp. 1976); MD. ANN. CODE art. 27, § 75(b) (1976 & Supp. 1977); MISS. CODE ANN. § 99-19-57 (1973); MO. ANN. STAT. §§ 546.800-.820 (Vernon, Supp. 1978); MONT. REV. CODES ANN. §§ 95-2306 to -2307 (1969); NEV. REV. STAT. §§ 176.465 to -.475 (1973 & Supp. 1977); OKLA. STAT. ANN. tit. 22, §§ 1010-1011 (West, 1958 & Supp. 1978); S.C. CODE § 16-3-27 (Law Co-op, Supp. 1977); WYO. STAT. ANN. § 7-13-918 (Michie, 1977). *See also* National Coalition Against the Death Penalty, Roster of Death-Row Population and Death Penalty-Laws by Jurisdiction at April 15, 1978 (on file at MINNESOTA LAW REVIEW), updated by Telephone Interview with Henry Schwarzschild, National Coalition Against the Death Penalty (Oct. 31, 1978). Even if such laws were not in existence, it is unlikely that a pregnant woman would be executed. Of 3,860 persons put to death since 1930, only 32 have been female. U.S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1975, 712 (1976). A literature search reveals no information on how many of these women were pregnant at execution, nor how many pregnant females were initially placed on death row by the courts. Due to the significant amount of time between imposition of a death sentence and execution, however, a pregnant woman entering death row would undoubtedly come to term before the sentence was carried out. *See, e.g.,* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1977, 191 (98th ed. 1977) [hereinafter cited as STATISTICAL ABSTRACT] (median elapsed time under sentences of death over three years).

Nineteen of the thirty-two death penalty states have provisions regarding the

letter has carried the attempt to restrict the Covenant's impact too far. Such a proposal does a disservice to the United States and its commitment to human rights by suggesting that this nation needs to stand before the world community and assert its right to execute

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imposition of capital punishment on juveniles. Four of those specifically prohibit the infliction of the death penalty on those under either 16, 17, or 18 years old. *See* CAL. PENAL CODE § 190.5 (West, Supp. 1978); NEV. REV. STAT. § 176.025 (1973 & Supp. 1977); TENN. CODE ANN. § 39-2404(h)(i)(1) (Supp. 1977); TEX. PENAL CODE tit. 1 § 807(d) (Vernon, Supp. 1978). Thirteen others make youth a mitigating circumstance in determining punishment. *See* CONN. GEN. STAT. ANN. § 53a-46a(f)(1) (West, Supp. 1978); FLA. STAT. ANN. § 921.141(6)(g) (West, Supp. 1978); ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd, Supp. 1978); KY. REV. STAT. ANN. §§ 532.025(b)(8) (Baldwin, 1977); LA. CODE CRIM. PRO. art. 905.5(f) (West, Supp. 1978); MD. ANN. CODE art. 27, § 134(b)(2) (Supp. 1977); MO. ANN. STAT. § 565.012(3)(7) (Vernon, Supp. 1978); NEB. REV. STAT. § 29-2523(2)(d) (1975); N.C. GEN. STAT. § 15A-2000(f)(7) (Michie, 1978); 18 PA. CONST. STAT. ANN. § 1311(d)(2)(i) (Purdon, Supp. 1978); UTAH CODE ANN. § 76-3-207(1)(e) (Supp. 1977); WASH. REV. CODE § 9A.32.045(2)(g) (Supp. 1978); WYO. STAT. ANN. § 6-4-102(j)(vii) (1977).

Figures relating to the execution of juveniles, like those for pregnant women, are relatively scarce. It appears that of 444 prisoners on death row as of December 31, 1976, twenty were under twenty years of age. STATISTICAL ABSTRACT, *supra* at 190. Only one adult male has been executed in the United States since 1967, N.Y. Times, March 16, 1976, at 22, col. 1; U.S. BUREAU OF PRISONS & U.S. DEP'T OF JUSTICE, NPS BULL. NO. 46, CAPITAL PUNISHMENT 1930-70, at 1, 4 n.2 (1971).

Since the death penalty is so rarely imposed, particularly on women and juveniles, it is extremely doubtful that the United States would ever make use of the proposed reservation concerning capital punishment. The federal government is itself considering a death penalty bill which would prohibit infliction of the death penalty on a pregnant woman and make the youth of the defendant a mitigating factor. *See Hearing on S.1382 Before a Subcomm. of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 13 (1977).

Each state in the United States that allows capital punishment also has a provision for pardon. *See* ALA. CONST. amend. 38; ARK. CONST. art. 6, § 18; CAL. CONST. art. 7, § 1; COLO. CONST. art. 4, § 7; CONN. GEN. STAT. ANN. § 18-26 (West, 1975); DEL. CONST. art. 7, § 1; FLA. CONST. art. 4, § 8; GA. CONST. art. 4, § 2-2001; IDAHO CONST. art. 4, § 7; ILL. CONST. art. 5, § 12; IND. CONST. art. 5, § 17; KY. CONST. § 77; LA. CONST. art. 4, § 5(E); MD. CONST. art. 2, § 20; MISS. CONST. art. 4, § 124; MO. CONST. art. 4, § 7; MONT. CONST. art. 6, § 12; NEB. CONST. art. 4, § 13; NEV. CONST. art. 3, § 6; N.C. CONST. art. 3, § 5(6); OKLA. CONST. art. 6, § 10; PA. CONST. art. 4, § 9; R.I. CONST. amend. 2; S.C. CONST. art. 4, § 14; TENN. CODE ANN. § 40-3505 (Supp. 1977); TEX. CONST. art. 4, § 11; UTAH CODE ANN. § 77-62-2 (Supp. 1977); VA. CONST. art. 5, § 12; WASH. CONST. art. 3, § 9; WYO. CONST. art. 4, § 5.

It is more difficult at this time to conclude how great an effect the Covenant's limitation of the death penalty to the "most serious crimes" might have on United States practices. The United States Supreme Court has determined, however, that under the cruel and unusual punishment clause of the eighth amendment some crimes are not of sufficient gravity to deserve capital punishment. *See Coker v. Georgia*, 433 U.S. 584 (1977) (Court held imposition of the death penalty for the offense of rape unconstitutional). United States law under the eighth amendment may, therefore, be in accord with the Covenant's reservation of the death penalty for only the most serious offenses. The limitation in the February 23rd letter thus adds little or no protection to United States practices.



children and pregnant women. Similarly, there appears to be no good reason to refuse to guarantee the availability of pardon or prevent the imposition of capital punishment for non-serious crimes.

#### E. REPEALED PENALTIES

Article 15 of the Covenant on Civil and Political Rights provides in pertinent part: "If, subsequent to the commission of [a criminal] offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."<sup>211</sup> The February 23rd letter states that such a humane practice is followed in many United States jurisdictions.<sup>212</sup> Yet, the letter proposes a reservation making that provision of the Covenant inapplicable.<sup>213</sup> If such a practice is frequently followed,<sup>214</sup> such a reservation appears unnecessary and can be explained as merely another effort to ensure that the Covenant has no impact in the United States.

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211. Covenant on Civil and Political Rights, *supra* note 2, art. 15, para. 1.

212. See *Message*, *supra* note 6, at XII.

213. *Id.*

214. As a general matter, it may be the case that parole boards consider a newly enacted mitigating punishment in their determination whether a prisoner should be released from confinement. The same lighter penalty principle does not appear to hold true, however, where the courts and the legislatures are concerned. In the absence of specific statutory provision to the contrary, the defendant is ordinarily sentenced under the law prevailing at the time of the offense. See, e.g., *P.H. v. State*, 504 P.2d 837, 841 (Alaska 1972); *Wildie v. State*, 326 So. 2d 198, 199 (Fla. App. 1976); *Dowdell v. State*, 336 N.E.2d 699, 701 (Ind. App. 1975); *State v. Allen*, 82 N.M. 373, 374, 482 P.2d 237, 238 (1971); ALASKA STAT. § 01.05.021(b) (1972); ARIZ. REV. STAT. ANN. § 1-246 (1974); ARK. STAT. ANN. §§ 1-103 to -104 (1976). Where the law prescribing a sentence is amended or repealed to establish a lesser penalty after final adjudication of defendant's conviction, the original sentence will usually be sustained. See, e.g., *Colvin v. Estelle*, 506 F.2d 747, 748 (5th Cir. 1975); *Way v. Super. Ct.*, 74 Cal. App. 3d 165, 179-80, 141 Cal. Rptr. 383, 392-93 (1977); *People v. Covington*, 29 Ill. App. 3d 580, 331 N.E.2d 283, 284 (1975); *People v. Osteen*, 46 Mich. App. 409, 414, 208 N.W.2d 198, 199 (1973); *Lampley v. State*, 308 So. 2d 87, 89-90 (Miss. 1975); *People v. Allen*, 51 A.D. 2d 748, 379 N.Y.S.2d 463 (1976); *State v. Williams*, 286 N.C. 422, 427-34, 212 S.E.2d 113-119 (1975); 1 U.S.C. § 29 (1970); CONN. GEN. STAT. ANN. § 1-1(t) (West, Supp. 1978); MASS. ANN. LAWS, ch. 4, § 6 (Michie, 1973). Even if the lighter penalty is enacted while a prosecution is still pending, many states nevertheless impose the heavier penalty of the repealed law. See, e.g., *United States v. Vallejo*, 476 F.2d 667, 670 (3d Cir. 1973), *cert. denied*, 414 U.S. 830, (1974); *United States v. Tillman*, 467 F.2d 645, 646 (3d Cir. 1972); *United States v. Fiore*, 467 F.2d 86, 88 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973); FLA. CONST. art. 10, § 9; ALA. CODE tit. 1, § 1-1-12 (Supp. 1977); COLO. REV. STAT. § 2-4-303 (Cum. Supp. 1976); *but see Shook v. Dist. Ct.*, 533 P.2d 41, 42 (Colo. 1975) (mitigation prior to final appeal); *People v. Williams*, 60 Ill. 2d 1, 16-17, 322 N.E.2d 819, 827 (1975) (mitigation prior to final appeal).

## F. COMPENSATION FOR UNLAWFUL ARREST OR DETENTION

Article 9, paragraph (5), of the Civil and Political Covenant provides: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."<sup>215</sup>

The February 23rd letter proposes a reservation to make that paragraph inapplicable.<sup>216</sup> Federal and state laws now provide for an enforceable right to compensation against the officials responsible, but not against their governmental unit.<sup>217</sup> It would appear that the United States already complies with Article 9, paragraph (5) and, accordingly, this proposed reservation is unnecessary.

## G. DOUBLE JEOPARDY PROVISION

The February 23rd letter also recommends an "understanding" to paragraph (7) of Article 14 of the Civil and Political Covenant,

that the prohibition on double jeopardy contained in paragraph (7) is applicable only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause.<sup>218</sup>

At the outset, it is difficult to understand why the authors of the

215. Covenant on Civil and Political Rights, *supra* note 2, art. 9, para. 5.

216. *Message*, *supra* note 6, at XII.

217. Although the meaning of "arbitrary" arrest or detention under United Nations' jurisprudence is unclear, *see* Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev. 1 at 5-8 (1964), the Federal Government has defined this term and has assured an adequate right of recovery for unlawful arbitrary arrest and detention by federal and state officers.

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 399 (1971), the U.S. Supreme Court held that a complaint alleging unlawful arrest by federal narcotics agents stated a cause of action for damages arising under the Constitution. On remand, the Court of Appeals for the Second Circuit stated that an arrest made in bad faith and without probable cause would provide sufficient grounds for the award of such damages. 456 F.2d 1339, 1347 (2d Cir. 1972). The courts have recognized a similar right to damages pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1977), against state officers acting under color of law. *See* *Danner v. Moore*, 306 F. Supp. 433, 435 (D.C. Pa. 1969); *U.S. ex rel. Brzozowski v. Randall*, 281 F. Supp. 306, 311 (D.C. Pa. 1968); *Beauregard v. Wingard*, 230 F. Supp. 167, 185 (D.C. Cal. 1964); *Selico v. Jackson*, 201 F. Supp. 475, 478 (D.C. Cal. 1962). *But cf.* *Rizzo v. Goode*, 423 U.S. 362, 378-80 (1976) (denying injunctive relief for alleged § 1983 civil rights violations by local police).

These damage actions apply against state and federal officials only in their individual capacities and not against the governments themselves. Hence, their scope may not be as broad as that envisioned by art. 9, para. 5, of the Civil and Political Covenant. Nevertheless, even if the difference in breadth was admitted to be a potential problem, this alone would not justify the unconditional language of the February 23rd reservation.

218. *Message*, *supra* note 6, at XIII.

February 23rd letter characterized this recommendation as an understanding rather than a reservation,<sup>219</sup> since it clearly limits the impact of Article 14 instead of merely clarifying its meaning. More importantly, however, the proposed limitation appears to directly contravene the language of Article 14, paragraph (7) of the Covenant which states: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."<sup>220</sup> This prohibition against double jeopardy obviously would apply to a situation in which a person had been first tried in state court and thereafter was prosecuted in federal court for the same offence, or vice versa.

Successive prosecutions by different governmental units were initially allowed in the United States because the fifth amendment's double jeopardy clause had not yet been made applicable to the States through the fourteenth amendment.<sup>221</sup> Those decisions have been severely criticized by both courts and commentators.<sup>222</sup> In a 1969 decision, the United States Supreme Court held that the double jeopardy prohibition is enforceable through the fourteenth amendment.<sup>223</sup> Hence, little remains to support the earlier interpretation permitting successive state and federal prosecutions.<sup>224</sup> As a matter

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219. See Laws and Practices Concerning the Conclusion of Treaties, U.N. Doc. ST/LEG/SER.B/3, at 131 (1952). See generally note 90, *supra*.

220. Covenant on Civil and Political Rights, *supra* note 2, art. 14, para. 7.

221. The cases generally cited as primary statements of the doctrine are *Abbate v. United States*, 359 U.S. 187, 196 (1959), and *Bartkus v. Illinois*, 359 U.S. 121, 136-37 (1959). See also *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 426 (1847).

222. See *Smith v. United States*, 423 U.S. 1303, 1307 (1975) (Douglas, J.); *Abbate v. United States*, 359 U.S. 187, 201 (1959) (Black, J., dissenting); *Bartkus v. Illinois*, 359 U.S. 121, 150 (1959) (Black, J., dissenting); *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977) (Aldisert, J., dissenting), *cert. denied sub nom. Millhouse v. United States*, 98 S. Ct. 1256 (1978); *Turley v. Wyrick*, 554 F.2d 840, 842-45 (8th Cir. 1977) (Lay, J., concurring) and cases there cited; Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. Rev. 1096, 1096-104 (1959); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A. L. Rev. 1, 6-8, 34-37 (1956); Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. Rev. 306, 327-47 (1963).

223. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

224. A common argument for the continued viability of reprosecution by different units of government emphasizes the dual sovereignty doctrine of *United States v. Lanza*, 260 U.S. 377, 382 (1923):

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

of practice, prosecutors today generally avoid successive state and federal prosecutions.<sup>225</sup> Nevertheless, because the drafters of the February 23rd letter wanted to assure that the Covenants changed nothing in United States law, they recommended an "understanding" to nullify the impact of Article 14.

## VII. CONCLUSION

Although this Article does not analyze every proposed reservation in the February 23rd letter, it illustrates how misguided that letter clearly is. Many of the proposed reservations or understandings appear either trivial, unnecessary, violative of international law, or a combination of the above.

It is difficult to understand what could have motivated the February 23rd letter and its underlying documents. One can hypothesize the existence of governmental lawyers so enthusiastic in the "defense" of their client<sup>226</sup> that they lost sight of the reasons for ratifying the Covenants in the first place. Alternatively, the President's letter may have been designed to ease ratification by attempting to foresee difficulties that might arise and to confront them at the outset, thus placing the Administration in a position to argue that no

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As Congress has made inroads through the commerce and spending powers into subjects traditionally reserved for the states, the two sovereignties argument has begun to appear strained. Most commentators agree, in addition, that the increased tendency of courts to stress the importance of individual interests at the expense of institutional considerations has severely eroded the foundation of this contention. See generally *Tarley v. Wyrick*, 554 F.2d 840, 842-43 (8th Cir. 1977) (Lay, J., concurring); Brant, *Overruling Bartkus and Abbate: A New Standard for Double Jeopardy*, 11 WASHBURN L.J. 188, 199 (1972); Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607, 610-20 (1966); Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1329-31 (1932); Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 CASE W. RES. L. REV. 700, 712-23 (1963); Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 CALIF. L. REV. 391, 398-404 (1970); Note, *Double Prosecution by State and Federal Governments, Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1544-65 (1967). But see *United States v. Wheeler*, 435 U.S. 313, 317-23, 328 (1978) (dual sovereignty theory permits successive prosecutions by Indian tribe and federal government).

225. The Department of Justice has a policy against duplicating a state prosecution. See, e.g., *Petite v. United States*, 361 U.S. 529, 531 (1960). It has announced as a general procedure "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id.* at 530; but see Note, 14 WAKE FOREST L. REV. 823, 824-25 (1978) (federal policy inconsistently applied).

226. A similar phenomenon has been noted in a related context. See *Review of the United Nation 33D Commission on Human Rights, Hearing before Subcomm. on International Organizations of House Comm. on International Relations*, 95th Cong., 1st Sess. 20 (1977).

further constitutional or legal impediments exist to ratification by the United States.

By offering such an extensive and intensive set of reservations to the Covenants, however, those who drafted these proposals may have undermined the basic purpose of ratifying the treaties: encouraging the implementation of human rights throughout the world. The proposed reservations may counter-productively and paradoxically focus attention on the difficulties with the Covenants rather than the benefits of ratification.

The Administration, moreover, may have committed a costly tactical error in proposing so many reservations, understandings, and declarations without waiting to hear the concerns of the Senate. As debate over the Covenants intensifies, the Administration may discover, to its chagrin, that it gave away all its bargaining chips in the February 23rd letter before the serious discussion actually began.